EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 8129

# United States Circuit Court of Appeals

## For the Ninth Circuit.

DOUGLAS L. EDMONDS, Administrator, Estate of JOHN W. MITCHELL, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOUGLAS L. EDMONDS, Administrator, Estate of ADINA MITCHELL, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

# Transcript of the Record

**Upon Petition to Review an Order of the United States Board of Tax Appeals.**



PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 8129

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

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# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Taxpayer:

CLAUDE I. PARKER, Esq.,
RALPH W. SMITH, Esq.,
L. A. LUCE, Esq.,

For Comm'r.:

T. M. MATHER, Esq.

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Docket No. 47516

ADINA MITCHELL, Executrix of the Estate of John W. Mitchell, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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DOCKET ENTRIES

Period-year 1924 & from 1/1/25 to 7/2/25.

1930

Feb. 15—Petition received and filed. Taxpayer notified. (Fee paid).

" 17—Copy of petition served on General Counsel.

Apr. 5—Answer filed by General Counsel.

" 8—Copy of answer served on taxpayer. Circuit Calendar.

1933

Jul. 11—Hearing set in Long Beach, Calif. beginning Sept. 11, 1933.

Oct. 2—Hearing had before Mr. Leech (heard by Mr. Van Fossan) on merits. Submitted. Assigned to Mr. Leech. Stipulation of facts filed. Briefs due Dec. 1, 1933—no exchange.

Dec. 1—Memorandum brief filed by General Counsel.

" 1—Motion for extension of time to Jan. 1, 1934 to file petitioner's brief filed by petitioner. 12/1/33 granted to both parties.

" 28—Motion for extension to 1/10/34 to file Brief filed by taxpayer—12/29/33 granted both parties.

1934

Jan. 10—Brief filed by taxpayer.

Dec. 28—Opinion rendered, J. Russell Leech, Div. 6. Judgment will be entered under Rule 50.

1935

Jan. 29—Notice of settlement filed by General Counsel.

Jan. 31—Hearing set Feb. 20, 1935 on settlement.

Feb. 18—Motion for 30 days continuance filed by taxpayer. 2/18/35 granted and continued to 3/20/35.

1935

Mar. 18—Motion for 20 days continuance filed by taxpayer. 3/19/35 granted and continued to 4/17/35.

Apr. 8—Motion for 20 days continuance filed by taxpayer. 4/10/35 granted and continued to 5/1/35.

Apr. 30—Motion for a continuance filed by taxpayer.

May 1—Hearing had before Mr. Black (Leech) on settlement under Rule 50. Petitioner's motion to continue granted to May 29, 1935.

" 1—Motion for continuance filed 4/30/35 by taxpayer granted and continued to 5/29/35.

" 20—Motion for reconsideration and rehearing filed by taxpayer.

" 20—Motion for continuance on Rule 50 and on motion for rehearing to 6/14/35 filed by taxpayer.

" 22—Motion for continuance on Rule 50 and on motion for rehearing to 6/14/35 granted.

" 22—Hearing set 6/14/35 on motion.

" 23—Copy of notice of hearing date and motion served on General Counsel.

Jun. 17—Hearing had before Mr. Leech on motion of petitioner for reconsideration and rehearing. C.A.V. Memorandum of authorities filed. Briefs none. [1*]

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

1935

Jun. 29—Transcript of hearing of June 17, 1935 filed.

Jul. 9—Memorandum and order that petitioner's motion for rehearing be denied entered.

" 11—Notice of hearing on July 24, 1935, on settlement under Rule 50.

" 24—Hearing had before Mr. Trammell on settlement under Rule 50. Referred to Mr. Leech for decision. (Not contested.)

" 29—Decision entered, J. Russell Leech, Div. 6.

Oct. 18—Stipulation of venue filed.

" 18—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 18—Proof of service filed.

Dec. 5—Motion for extension of 30 days from 12/27/35 to complete record filed by taxpayer.

" 5—Order enlarging time to 1/27/36 for preparation of evidence and delivery of record entered.

1936

Jan. 8—Motion for extension of 30 days to transmit record filed by taxpayer.

" 8—Order enlarging time to 2/25/36 for preparation of evidence and delivery of record entered.

" 8—Praecipe with proof of service thereon filed. [2]

APPEARANCES

For Taxpayer:
CLAUDE I. PARKER, Esq.,
RALPH W. SMITH, Esq.,
L. A. LUCE, Esq.

For Comm'r.:
THOMAS M. MATHER, Esq.,
WALTER W. KERR, Esq.

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Docket No. 66584.

DOUGLAS L. EDMONDS, Administrator de bonis non of the Estate of Adina Mitchell, Deceased,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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DOCKET ENTRIES.

1932

Jun. 13—Petition received and filed. Taxpayer notified. (Fee paid).

" 13—Copy of petition served on General Counsel.

Aug. 11—Answer filed by General Counsel.

Sep. 20—Copy of answer served on taxpayer. Circuit Calendar.

1933

Jul. 11—Hearing set in Long Beach, Calif. beginning Sept. 11, 1933.

1933

Jul. 29—Motion for leave to file amended answer filed by General Counsel. Amended answer lodged.

Aug. 2—Motion for leave to file amended answer granted.

Oct. 2—Hearing had before Mr. Leech (Heard by Van Fossan) on merits. Submitted. Assigned to Division #6, Mr. Leech. Stipulation of facts filed. Briefs due Dec. 1, 1933—no exchange.

Dec. 1—Memorandum brief filed by General Counsel.

" 1—Motion for extension to Jan. 1, 1934 to file brief filed by taxpayer. Dec. 1, 1933 granted to both parties.

" 28—Motion for extension to Jan. 10, 1934 to file brief filed by taxpayer. 12/29/33 granted to both parties.

1934

Jan. 10—Brief filed by taxpayer.

Dec. 28—Opinion rendered, J. Russell Leech, Div. 6. Judgment will be entered under Rule 50.

1935

Jan. 29—Notice of settlement filed by General Counsel.

" 31—Hearing set Feb. 20, 1935 on settlement.

Feb. 18—Motion for 30 days continuance filed by taxpayer. 2/18/35 granted and continued to 3/20/35.

1935

Mar. 18—Motion for 20 days continuance filed by taxpayer. 3/19/35 granted and continued to 4/17/35.

Apr. 8—Motion for 20 days continuance filed by taxpayer. 4/10/35 granted and continued to 5/1/35.

" 30—Motion for a continuance filed by taxpayer.

May 1—Hearing had before Mr. Black (Leech) on settlement under Rule 50. Petitioner's motion to continue—granted and continued to May 29, 1935.

" 1—Motion for a continuance filed 4/30/35 by taxpayer granted and continued to May 29, 1935.

" 20—Motion for reconsideration and rehearing filed by taxpayer. [3]

" 20—Motion for continuance to 6/14/35 on rule 50 and hearing on motion for rehearing filed by taxpayer. 5/22/35 granted.

" 22—Hearing set June 14, 1935 on motion

" 23—Copy of notice of hearing date and motion served on General Counsel.

Jun. 17—Hearing had before Mr. Leech on motion of petitioner for reconsideration and rehearing. C.A.V. Memorandum of authorities filed.

" 29—Transcript of hearing of June 17, 1935 filed.

Jul. 9—Memorandum and order that petitioner's motion for rehearing and reconsideration be denied entered.

1935

Jul. 11—Notice of hearing on July 24, 1935 on settlement under Rule 50.

" 24—Hearing had before Mr. Trammell on settlement under Rule 50. Not contested—referred to Mr. Leech for decision.

" 29—Decision entered, J. Russell Leech, Div. 6.

Oct. 18—Stipulation of venue filed.

" 18—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 18—Proof of service filed by taxpayer.

Dec. 5—Motion for extension of 30 days from 12/27/35 to complete record filed by taxpayer.

" 5—Order enlarging time to Jan. 27, 1936 for preparation of evidence and delivery of record entered.

1936

Jan. 8—Motion for extension of 30 days to transmit record filed by taxpayer.

" 8—Order enlarging time to Feb. 25, 1936 for preparation of evidence and delivery of record entered.

" 8—Praecipe with proof of service thereon filed. [4]

APPEARANCES

For Taxpayer:

CLAUDE I. PARKER, Esq.,
RALPH W. SMITH, Esq.,
L. A. LUCE, Esq.,
RICHARD S. EDMOND, Esq.

For Comm'r.:

T. M. MATHER, Esq.,
WALTER W. KERR, Esq.

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Docket No. 70861.

DOUGLAS L. EDMONDS, Administrator de bonis non of the Estate of Adina Mitchell, Deceased, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

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DOCKET ENTRIES.

1933

Apr. 3—Petition received and filed. Taxpayer notified. (Fee paid).

" 3—Copy of petition served on General Counsel.

May 31—Answer filed by General Counsel.

Jun. 8—Copy of answer served on taxpayer. Circuit Calendar (vicinity of Los Angeles, Calif.

1935

Jul. 14—Hearing at Long Beach, Calif. week of 9/11/33.

Oct. 2—Hearing had before Mr. Leech (heard by Mr. Van Fossan) on merits. Submitted. Assigned to Mr. Leech, Div. 6. Stipulation of facts filed. Briefs due 12/1/33—no exchange.

" 16—Transcript of hearing of Oct. 2, 1933 filed.

Dec. 1—Memorandum brief filed by General Counsel.

" 1—Motion for extension of time to file brief to 1/1/34 filed by taxpayer. 12/1/33 granted to both parties.

" 28—Motion for extension to Jan. 10, 1934 to file brief filed by taxpayer. 12/29/33 granted to both parties.

1934

Jan. 10—Brief filed by taxpayer.

Dec. 28—Opinion rendered, J. Russell Leech. Judgment will be entered under Rule 50.

1935

Jan. 29—Notice of settlement filed by General Counsel.

" 31—Hearing set Feb. 20, 1935 under Rule 50.

Feb. 18—Motion for 30 days continuance filed by taxpayer. 2/18/35 granted and continued to 3/20/35.

Mar. 18—Motion for 20 days continuance filed by taxpayer. 3/19/35 granted and continued to 4/17/35.

1935

Apr. 8—Motion for 20 days continuance filed by taxpayer. 4/10/35 granted and continued to 5/1/35.

" 30—Motion for a continuance filed by taxpayer.

May 1—Hearing had before Mr. Black (Leech) on settlement under Rule 50. Petitioner's motion to continue granted to May 29, 1935.

" 1—Motion for continuance filed 4/30/35 by taxpayer granted and continued to 5/29/35

" 20—Motion for reconsideration and rehearing filed by taxpayer.

" 20—Motion for continuance on Rule 50 and on motion for rehearing to 6/14/35 granted.

" 22—Hearing set 6/14/35 on motion. [5]

" 23—Copy of notice of hearing date and motion served on General Counsel.

Jun. 17—Hearing had before Mr. Leech on motion of petitioner for reconsideration and rehearing. C.A.V. Memorandum of authorities filed. Briefs none.

" 29—Transcript of hearing of June 17, 1935 filed.

Jul. 9—Memorandum and order that petitioner's motion for rehearing be denied entered.

" 11—Notice of hearing on July 24, 1935 on settlement under Rule 50.

1935

Jul. 24—Hearing had before Mr. Trammell on settlement under Rule 50. Referred to Mr. Leech for decision—not contested.

" 29—Decision entered, J. Russell Leech, Div. 6.

Oct. 18—Stipulation of venue filed.

" 18—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

" 18—Proof of service filed by taxpayer.

Dec. 5—Motion for extension of 30 days from 12/27/35 to complete record filed by taxpayer.

Dec. 5—Order enlarging time to 1/27/36 for preparation of evidence and delivery of record entered.

1936

Jan. 8—Motion for extension of 30 days to transmit record filed by taxpayer.

" 8—Order enlarging time to 2/25/36 for preparation of evidence and delivery of record entered.

" 8—Praecipe with proof of service thereon filed. [6]

United States Board of Tax Appeals.

Docket No. 47516.

ADINA MITCHELL, Executrix of the Estate of John W. Mitchell, Deceased,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, IT:AR:B-12. CGW-60D, dated December 20, 1929, and as a basis of her proceedings alleges as follows:

1. That John W. Mitchell died, a resident of the County of San Diego, State of California, on the 2nd day of July, 1925, and thereafter your petitioner was duly appointed Executrix of the estate of the said John W. Mitchell, deceased, and duly qualified as such Executrix and is still the duly appointed, qualified and acting executrix of the estate of said decedent.

2. That petitioner is a resident of the County of San Diego, State of California, receiving mail at 808 Bank of America Building, Los Angeles, California.

3. The notice of deficiency, a copy of which is hereto attached and marked Exhibit A, was mailed to the petitioner on December 20, 1929.

4. The taxes in controversy are income taxes for the period [7] of year 1924 and the period January 1 to July 2, 1925, and for $17,013.76, the whole of said tax being in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) Respondent erred in determining the fair market value of the property sold by decedent as of March 1, 1913.

(b) Respondent erred in determining any deficiency whatever against said petitioner as petitioner is not responsible for any tax liability that might have been owing or accrued by reason of the sale of property by decedent during his life or upon the capital gain or income therefrom.

(c) Respondent erred in failing to allow as deductions the items so claimed in return filed by decedent, John W. Mitchell.

(d) Respondent erred in determining the amount of gross income and the net income of John W. Mitchell.

(e) Respondent erred in determining a deficiency and was without authority to issue a 60 day letter by reason of the fact that said assessment of a deficiency was barred by the statute of limitations in that the time within which the alleged defi-

ciency for the year 1925 may be assessed had expired.

6. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

John W. Mitchell died testate July 2, 1925; Adina Mitchell, his widow, petitioner herein, is the duly appointed, qualified and acting Executrix of his estate. Decedent prior to his death held title to property which was transferred to the Title Guarantee and Trust Company of Los Angeles, California, and thereafter formed Trusts No. 750, 807 and 822. [8]

As to Trust No. 750, decedent provided that one King C. Gillette should share equally with him in the net proceeds from the sales thereunder in return for monies advanced by said Gillette.

As to Trust No. 807 after the real property had been conveyed to the Title Guarantee and Trust Company thereunder, decedent authorized said Trustee to convey certain of the real property under said trust to the Los Angeles Stone Company, taking in return therefor certain monies and the promissory note of said corporation payable to decedent and secured by a Deed of Trust upon the land so conveyed.

As to Trust No. 822, after the conveyance of the real property to the Title Guarantee and Trust Company thereunder, decedent authorized said trustee to convey all of said real property to one F. A. Hartwell, taking in payment therefor certain monies

and two promissory notes executed by F. A. Hartwell, payable to the order of decedent and secured by Deeds of Trust to the property so conveyed.

That thereupon the said three promissory notes and Deeds of Trust securing same, were deposited with the Title Guarantee and Trust Company for collection and that the said Trustee has since collected the principal and interest accruing thereon and remitted same to decedent and after his death to the executrix of his estate.

After, however, the delivery of the said three promissory notes to John W. Mitchell, he caused to have his beneficial interest in said trusts to be assigned to himself and wife as joint tenants with right of survivorship. [9]

Petitioner avers that respondent erred in determining the March 1, 1913 value of the property in said trusts, and in this connection states that the March 1, 1913 value of the property embracing Trust No. 750 was $245,400.00 plus improvements since that date of $125,374.59, making a total cost of said property $370,774.59. As to Trust No. 807, the fair market value as of March 1, 1913 of the property sold under said trust was $150,000.00. As to Trust No. 822, the fair market value as of March 1, 1913 of the property sold under said trust was $172,500.00.

WHEREFORE, petitioner prays that this Board may hear the proceedings and redetermine the tax

liability herein alleged, and by its judgment grant to said petitioner the relief herein asked.

CLAUDE I. PARKER
RALPH W. SMITH
Counsel for Petitioner
808 Bank of America Bldg.,
Los Angeles, California. [10]

State of California
County of Los Angeles—ss.

ADINA MITCHELL, being first duly sworn, says that she is the petitioner above named; that she has read the foregoing petition, or had the same read to her and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts she believes to be true.

ADINA MITCHELL

Subscribed and sworn to before me this 11th day of February, 1930.

[Seal] MYRTLE V. HITCHCOCK
Notary Public, in and for the County of Los Angeles, State of California. My commission expires Mar. 31, 1933. [11]

EXHIBIT "A".

TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal Revenue

Dec 20 1929

Mrs. Adina Mitchell, Executrix,
Estate of John W. Mitchell, Deceased,
1063 Ocean Boulevard,
Coronado, California.

Madam:

In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1924 and the period January 1 to July 2, 1925, discloses a deficiency of $17,013.76, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,
ROB'T H. LUCAS,
Commissioner
By DAVID BURNET
Deputy Commissioner.

Inclosures:
Statement
Form 866
Form 882 [12]

STATEMENT.

IT:AR:B-12
CGW-60D

Dec. 20 1929

In re: Mrs. Adina Mitchell, Executrix,
Estate of John W. Mitchell, Deceased,
1063 Ocean Boulevard,
Coronado, California.

TAX LIABILITY.

| Year | Corrected Tax Liability | Tax Previously Assessed | Deficiency |
|---|---|---|---|
| 1924 | $ 7,860.14 | $2,117.15 | $ 5,742.99 |
| Period January 1, to July 2, 1925 | 11,339.64 | 68.87 | 11,270.77 |
| Totals | $19,199.78 | $2,186.02 | $17.013.76 |

The report of the Internal Revenue Agent in Charge at San Francisco, California, has been reviewed and approved by this office.

Consents which will expire December 31, 1929, except as extended by the provisions of Section 277(b) of the Revenue Act of 1926, are on file for the years 1924 and 1925.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

A copy of this letter has been mailed to your representative, Mr. Ralph W. Smith in accordance with the power of attorney executed by you and on file with the Bureau.

[Endorsed]: Filed Feb. 15, 1930. [13]

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[Title of Court and Cause—Docket #47516.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this petitioner, admits and denies as follows:

1. Admits the allegations of paragraph 1 of the petition.

2. Admits the allegations of paragraph 2 of the petition.

3. Admits the allegations of paragraph 3 of the petition.

4. (a) to (e) Denies the allegations of error contained in subdivisions (a) to (e) inclusive of paragraph 4 of the petition.

5. Denies the allegations of fact contained in paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petitioner's petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal of the petitioner be denied.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel,
JOHN D. KILEY,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Apr. 5, 1930. [14]

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United States Board of Tax Appeals.

Docket No. 66584.

DOUGLAS L. EDMONDS, Administrator de bonis non of the Estate of Adina Mitchell, Deceased,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.
Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:E-1 RCC-60D) dated April 16, 1932, and as a basis of his proceedings alleges as follows:

1. That Adina Mitchell died, a resident of the County of San Diego, State of California, on the 20th day of April, 1931, and thereafter your petitioner was duly appointed Administrator De Bonis Non of the estate of said Adina Mitchell, and duly qualified as such Administrator, and is still the duly appointed, qualified and acting Administrator of the estate of said decedent.

2. That petitioner is a resident of the County of Los Angeles, State of California, receiving mail at [15] 808 Bank of America Building, Los Angeles, California.

3. That the notice of deficiency (a copy of which is attached and marked EXHIBIT A) was dated April 16, 1932, and presumably mailed as of that date.

4. The taxes in controversy are income taxes on Adina Mitchell, deceased, for the period July 2nd to December 31, 1925, and for the years 1926, 1927 and 1928, and the controversy must be determined under the revenue acts applicable thereto; and as determined by the Commissioner, the deficiency tax liability is in the sum of $17,939.95 and penalty of $4,484.98, all of which sums are in controversy here, the petitioner denying any liability for tax.

5. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

1. That the income determined by respondent as taxable against Adina Mitchell, deceased, was re-

ceived by her by gift, descent or devise from the estate of her deceased husband, John W. Mitchell.

2. That the income determined against petitioner in said EXHIBIT A was not her income but was the income of the Estate of John W. Mitchell, deceased, and was received by the estate of said decedent and not by said Adina Mitchell.

3. That the said income set forth in said EXHIBIT A was not income but was a return of capital.

4. That any profits realized through the sale of the property set forth in EXHIBIT A were returned and a tax paid thereon by the said John W. Mitchell or by [16] his estate.

5. That the property from which the alleged income was realized, as set forth in said EXHIBIT A, was not at any time joint tenancy property but title thereto stood at all times in the name of John W. Mitchell.

6. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

1. Prior to April 1, 1924, title to certain real property stood in the name of a banking institution in Los Angeles, California, and was then conveyed by it to Title Guarantee and Trust Company, a corporation, of Los Angeles, which executed two revocable Declarations of Trust reciting that title was held in the name of John W. Mitchell. Thereafter, and prior to April 1, 1924, Mr. Mitchell sold most of the property and received therefor three

promissory notes secured by deeds of trust. These notes were all payable to John W. Mitchell, who deposited them with Title Guarantee and Trust Company as security for advances made and to be thereafter made by it to him. These notes were never held by said Trustee under its Declarations of Trust, but at all times since the date of their execution and delivery were held by it as collateral security for loans, which are in part yet unpaid.

2. The income which the Government is attempting to tax in these proceedings is income derived from payments on the principal of these promissory notes, all of which was either paid to John W. Mitchell prior to July 2, [17] 1925, the date of his death, or thereafter to his estate.

3. That on April 1, 1924, John W. Mitchell and Adina Mitchell, his wife, executed a certain instrument which recited that all of the properties held by Title Guarantee and Trust Company as trustee should be held in trust for John W. Mitchell and Adina Mitchell, his wife, as joint tenants; but that at the date of the execution of said instrument the only property which Title Guarantee and Trust Company held under the said Declarations of Trust theretofore made was a small portion of the real estate originally conveyed, practically all of which is still held by said company as trustee. That said instrument did not affect the notes from which the income set forth in EXHIBIT A was realized. Further, said agreement, in so far as it attempts

to create an estate in joint tenancy, petitioner avers is void.

WHEREFORE, petitioner prays that this Honorable Board may hear and redetermine the tax liability herein alleged, and by its judgment grant to said petitioner the relief herein asked.

CLAUDE I. PARKER
937 Munsey Bldg.,
Washington, D. C.
and
RALPH W. SMITH
Attorneys for Petitioner
808 Bank of America Building
Los Angeles, California.

L. A. LUCE
937 Munsey Building
Washington, D. C.
Of Counsel. [18]

State of California
County of Los Angeles—ss.

DOUGLAS L. EDMONDS, hereby duly sworn, says that he is the Administrator de bonis non of the Estate of Adina Mitchell, deceased, and the petitioner above named; that he has read the foregoing petition, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief and those facts he believes to be true.

DOUGLAS L. EDMONDS

Subscribed and sworn to before me this 8th day of June, 1932.

[Seal] MARGUERITE LE SAGE

Notary Public in and for the County of Los Angeles, State of California. [19]

EXHIBIT A.

TREASURY DEPARTMENT
WASHINGTON

NP-2-26-28

April 16, 1932

Office of
Commissioner of Internal Revenue
Mrs. Adina Mitchell
c/o Claude I. Parker and Ralph W. Smith,
808 Bank of America Bldg.,
Los Angeles, California.

Madam:

You are advised that the determination of your tax liability for the period July 2 to December 31. 1925 and years 1926, 1927 and 1928, discloses a deficiency of $17,939.95 and penalty of $4,484.98 as shown in the statement attached.

In accordance with section 274 of the Revenue Act of 1926 and section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of

your tax liability for the years in which a deficiency is disclosed.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your returns by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner.
By (Signed) J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870 [20]

STATEMENT.

IT:AR:E-1
RCC-60D

In re: Mrs. Adina Mitchell,
c/o Claude I. Parker and
Ralph W. Smith,
808 Bank of America Bldg.,
Los Angeles, California.

TAX LIABILITY.

| Years | Tax Liability | Tax Assessed | Deficiency | Penalty |
|---|---|---|---|---|
| Period July 2, to Dec. 31, 1925 | $ 5,669.58 | None | $ 5,669.58 | $1,417.39 |
| 1926 | 4,095.80 | None | 4,095.80 | 1,023.95 |
| 1927 | 3.623.49 | None | 3,623.49 | 905.87 |
| 1928 | 4,551.08 | None | 4,551.08 | 1,137.77 |
| Totals | $17,939.95 | None | $17.939.95 | $4,484.98 |

Further reference is made to the reports of the internal revenue agent in charge at Los Angeles, California, covering your tax liability for the above-mentioned years, to protests filed with that official and conference held with your representative on August 18, 1930.

The deficiency arises through the treatment of the entire income realized from Trust #822B as your separate income taxable to you instead of treating the income in part as taxable to the estate of your deceased husband.

This office has given careful consideration to your protest and information submitted at the conference, but since it appears from declaration of Trust Agreement 822B that the trust created a joint tenancy, with right of survivorship in all the F. A. Hartwell notes and two trust deeds as well as all the assets of Trusts #750, #807 and #822, you became sole beneficiary of the trusts and the Hartwell notes by your right of survivorship in the joint tenancy created by Trust #822B. All of the income from Trust #822B is, therefore, held to be taxable to you.

| | Period July 2, to December 31, 1925 |
|---|---|
| Net income from Trust #822B | $52,724.82 |
| Less: | |
| Personal exemption | 1,500.00 |
| Balance subject to normal tax | $51,224.82 |
| | [21] |
| Normal tax at 1½% on $4,000.00 | $ 60.00 |
| Normal tax at 3% on $4,0O0.00 | 120.00 |
| Normal tax at 5% on $43,224.82 | 2,161.24 |
| Surtax on $52,724.82 | 3,341.47 |
| Total tax | $ 5,682.71 |
| Less: | |
| 25% earned income credit | 13.13 |
| Corrected tax liability | $ 5,669.58 |
| 25% penalty | 1,417.39 |
| Total tax and penalty | $ 7,086.97 |
| Tax previously assessed | None |

| 1926 | |
|---|---|
| Net income from Trust #822B | $43,774.55 |
| Less: | |
| Personal exemption | 1,500.00 |
| Balance subject to normal tax | $42,274.55 |
| Normal tax at 1½% on $4,000.00 | $ 60.00 |
| Normal tax at 3% on $4,000.00 | 120.00 |
| Normal tax at 5% on $34,274.55 | 1,713.73 |
| Surtax on $43,774.55 | 2,215.20 |
| Total tax | $ 4,108.93 |
| Less: | |
| 25% earned income credit | 13.13 |
| Corrected tax liability | $ 4,095.80 |
| 25% penalty | 1,023.95 |
| Total tax and penalty | $ 5,119.75 |
| Tax previously assessed | None |
| Deficiency in tax | $ 5,119.75 |

| 1927 | |
|---|---|
| Net income from Trust #822B | $40,822.62 |
| Less: | |
| Personal exemption | 1,500.00 |
| Balance subject to normal tax | $39,322.62 |

[22]

| | |
|---|---|
| Normal tax at 1½% on $4,000.00 | $ 60.00 |
| Normal tax at 3% on $4,000.00 | 120.00 |
| Normal tax at 5% on $31,322.62 | 1,566.13 |
| Surtax on $40,822.62 | 1,890.49 |
| Total tax | $ 3,636.62 |
| Less: | |
| 25% earned income credit | 13.13 |
| Corrected tax liability | $ 3,623.49 |
| 25% penalty | 905.87 |
| Total tax and penalty | $ 4,529.36 |
| Tax previously assessed | None |
| Deficiency in tax | $ 4,529.36 |

1928

| | |
|---|---|
| Net income from Trust #822B | $46,465.92 |
| Less: | |
| Personal exemption | 1,500.00 |
| Balance subject to normal tax | $44,965.92 |
| Normal tax at 1½% on $4,000.00 | $ 60.00 |
| Normal tax at 3% on $4,000.00 | 120.00 |
| Normal tax at 5% on $36,965.92 | 1,848.30 |
| Surtax on $46,465.92 | 2,535.91 |
| Total tax | $ 4,564.21 |

| | |
|---|---|
| Less: | |
| earned income credit | 13.13 |
| Corrected tax liability | $ 4.551.08 |
| 25% penalty | 1,137.77 |
| Total tax and penalty | $ 5,688.85 |
| Tax previously assessed | None |
| Deficiency in tax | $ 5,688.85 |

Earned income credit has been computed on earned income of $5,000.00 for all years.

The penalty of 25% shown herein is asserted under the provisions of section 3176 of the Revised Statutes.

[Endorsed]: Filed June 13, 1932. [23]

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[Title of Court and Cause.—Docket 66584.]

## ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this petitioner, admits and denies as follows:

1, to 4. Admits the allegations of paragraphs 1 to 4 inclusive, of the petition.

5. (1) to (5) Denies the allegations of error contained in subdivisions (1) to (5) inclusive, of paragraph 5 of the petition.

6. (1) to (3) Denies the allegations of fact contained in subdivisions (1) to (3) inclusive, of paragraph 6 of the petition.

7. Denies generally and specifically each and every allegation contained in the petitioner's petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal of the petitioner be denied.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

JOHN D. KILEY,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Aug. 11, 1932. [24]

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[Title of Court and Cause—Docket 66584.]

AMENDED ANSWER.

Comes now the Commissioner of Internal Revenue, by his attorney, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and for amended answer to the petition of this petitioner, admits, denies and alleges as follows:

1 to 3. Admits the allegations of paragraphs 1 to 3 inclusive of the petition.

4. Admits the allegations in paragraph 4 of the petition except the allegations with respect to the year 1926, which the respondent alleges should include income received by the petitioner from Trust

#807, Title Guarantee and Trust Company, Trustee, in the amount of $11,121.50.

5. Denies that the Commissioner erred in the determination of said deficiency as alleged in subdivisions (1) to (5) inclusive of paragraph 5 of the petition and alleges that the Commissioner erred by not including in the petitioner's income for the year 1926 the sum of $11,121.50, the amount of income received by the petitioner from Trust #807.

[25]

6. Denies the allegations of fact contained in subdivisions (1) to (3) inclusive of paragraph 6 of the petition.

Denies generally and specifically each and every allegation contained in the petitioner's petition not hereinbefore admitted, qualified or denied.

1. For further and affirmative defense the respondent alleges that in 1922 John W. Mitchell transferred various parcels of real estate to the Title Guaranty and Trust Company, which issued three declarations of trust specifying the interest of John W. Mitchell in such property. These declarations of trust were designated as Nos. 750, 807 and 822.

2. Mrs. Adina Mitchell, the petitioner herein, was the widow of John W. Mitchell who died on July 2, 1925.

3. On April 1, 1924 the Title Guarantee and Trust Company, at the request of John W. Mitchell and Adina Mitchell, issued a new declaration of trust under #822B in which it declared that the interest in Trust #750, #807 and #822 were held

by it for John W. Mitchell and Adina Mitchell as joint tenants with right of survivorship.

4. At the time the various properties belonging to John W. Mitchell and/or Adina Mitchell were transferred to the Title Guarantee and Trust Company in 1922, John W. Mitchell had arranged the sale of 1500 feet of beach frontage in Santa Monica to F. E. Bundy and associates for $150,000 of which $25,000 was paid in cash and a note for $125,000 given for the balance.

5. The Title Guarantee and Trust Company issued its declaration of Trust #807 in which John W. Mitchell was designated as seller and entitled to receive the sum of $125,000 out of payments made by sub- [26] sequent lot purchasers.

6. The trustee of Trust #807 collected all amounts paid by the lot purchasers and a portion of each payment was credited on its books to John W. Mitchell as payment on the purchase note for $125,000. $22,243.00 was collected and credited to the account of John W. Mitchell in the year 1926.

7. In the returns filed by John W. Mitchell, deceased, during his lifetime no income was reported as received through Trust #807 or from the sale of land to that trust. On April 1, 1924 Mrs. Adina Mitchell acquired a joint interest in the note for $125,000 by the declaration of Trust #822B and entitled to 50% of the profit realized from subsequent collections.

8. At the date of death of John W. Mitchell, July 2, 1925, Mrs. Adina Mitchell became sole

owner of the note in question by right of survivorship and entitled to the entire income derived from subsequent collections.

9. That for the year 1926, in determining the deficiency in income, the Commissioner failed to include in petitioner's income any profit derived from collections received by the petitioner from said $125,000 note.

10. Petitioner having received during the year 1926 collections from said note in the amount of $22,243.00, 50% of which represents realized profit, the petitioner's income for 1926 should be increased by the amount of $11,121.50.

WHEREFORE, it is prayed that the Board redetermine the amounts of deficiencies involved in this proceeding to be equal to the respec- [27] tive amounts determined by the Commissioner plus such additional amount as may arise from the correction of the error alleged for the year 1926 committed by the Commissioner. Claim is hereby asserted for the increased deficiency resulting from such redetermination.

E. BARRETT PRETTYMAN
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

T. M. MATHER,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed] Lodged Jul. 29, 1933. Filed Aug. 2. 1933. [28]

[Title of Court and Cause—Docket No. 66584.]

REPLY.

Comes now the petitioner by his attorneys, Claude I. Parker and Ralph W. Smith, and for reply to the amended answer of respondent herein admits, denies and alleges as follows:

4. Replying to paragraph 4 on page 1 of said amended answer, denies that the year 1926 should include income received by petitioner from Trust No. 807, Title Guarantee and Trust Company, trustee, in the amount of $11,121.50, or any amount, and denies that petitioner or petitioner's decedent received income from said trust 807 in the amount of $11,121.50, or in any amount, in the year 1926.

5. Replying to paragraph 5 on page 1 of said amended answer denies that the Commissioner erred by not including in petitioner's income for the year 1926 the sum of $11,121.50, and denies that said amount or any amount of income was received by petitioner or petitioner's decedent from said trust 807.

1 - 2. Admits the allegations of paragraphs 1 and 2 on page 2 of said amended answer.

3. Replying to paragraph 3 on page 2 of said amended answer denies that on April 1, 1924, or at any time, Title Guarantee and [29] Trust Company at the request of John W. Mitchell and Adina Mitchell, or otherwise, issued a new declaration of trust under #822B, or otherwise, in which it is declared that the interest in trusts #750, #807

and #822 were held by it for John W. Mitchell and Adina Mitchell as joint tenants with the right of survivorship.

4. Replying to paragraph 4 on page 2 of said amended answer, alleges that petitioner does not have information sufficient to enable him to answer the allegations of said paragraph 4 but believes said allegations to be untrue and petitioner therefore denies generally and specifically each and every allegation contained in said paragraph 4.

5. Replying to paragraph 5 on pages 2 and 3 of said amended answer, denies that John W. Mitchell was entitled to receive the sum of $125,000.00, or any sum, out of payments made by subsequent lot purchases.

6. Replying to paragraph 6 on page 3 of said amended answer alleges that petitioner has no information sufficient to enable him to answer the allegations in said paragraph 6, but believes said allegations to be untrue and petitioner therefore denies generally and specifically each and every allegation contained in said paragraph 6.

7. Replying to paragraph 7 on page 3 of said amended answer, alleges that petitioner does not have information sufficient to enable him to answer the allegations in said paragraph 7 beginning with the words "in the return filed by John W. Mitchell" and ending with the words "or from the sale of land to that trust", but believes said allegations to be untrue and therefore denies generally and specifically each and every allegation in said

portion of said [30] paragraph 7. Further replying to said paragraph 7 denies that on April 1, 1924 Mrs. Adina Mitchell acquired a joint interest in the note for $125,000.00, or any sum, by the declaration of trust #822B or otherwise, and/or was entitled to fifty per cent of the profits realized from subsequent collections.

8. Replying to paragraph 8 on page 3 of said amended answer, denies generally and specifically each and every allegation therein contained.

9. Replying to paragraph 9 on page 3 of said amended answer, denies that petitioner had or derived any income for the year 1926 from said note mentioned in said paragraph.

10. Replying to paragraph 10 on page 3 of said amended answer, denies generally and specifically each and every allegation therein contained.

11. Denies generally and specifically each and every allegation contained in respondent's said amended answer not hereinbefore qualified, admitted or denied.

WHEREFORE petitioner prays that this Honorable Board may hear and determine the tax liability herein involved and by its judgment determine that there is no deficiency in tax.

CLAUDE I. PARKER
RALPH W. SMITH
Counsel for Petitioner.

Of Counsel:
L. A. LUCE
937 Munsey Building,
Washington, D. C. [31]

United States of America
State of California
County of Los Angeles—ss.

DOUGLAS L. EDMONDS, being first duly sworn on his oath, deposes and says:

That he is the duly qualified, appointed and acting Administrator De Bonis Non of the Estate of Adina Mitchell, deceased, and the petitioner hereinabove named; that he has read the foregoing Reply to the Amended Answer of Respondent herein and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts to be upon information and belief, and those facts he believes to be true.

DOUGLAS L. EDMONDS

Subscribed and sworn to before me this 15th day of September, 1933.

[Seal] MARGUERITE LE SAGE
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed at hearing Sep. 15, 1933. [32]

United States Board of Tax Appeals

Docket No. 70861.

DOUGLAS L. EDMONDS, Administrator de bonis non of the Estate of Alina Mitchell, Deceased,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:E-1 AEF-60D) dated February 4, 1933, and as a basis of his proceeding alleges as follows:

1. That Adina Mitchell died, a resident of the County of San Diego, State of California, on the 20th day of April, 1931, and thereafter your petitioner was duly appointed Administrator De Bonis Non of the estate of said Adina Mitchell, and duly qualified as such Administrator, and is still the duly appointed, qualified and acting Administrator of the estate of said decedent. [33]

2. That petitioner is a resident of the County of Los Angeles, State of California, receiving mail at 808 Bank of America Building, Los Angeles, California.

3. That the notice of deficiency (a copy of which is attached and marked EXHIBIT A) was dated February 4, 1933, and presumably mailed as of that date.

4. The taxes in controversy are income taxes of Adina Mitchell, deceased, for the year 1925, and the controversy must be determined under the revenue acts applicable thereto; and as determined by the Commissioner the deficiency tax liability is in the sum of $17,600.17 and penalty of $4400.04, all of which sums are in controversy here, the petitioner denying any liability for tax or penalty.

5. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) That the income determined by respondent as taxable against Adina Mitchell, deceased, was received by her by gift, descent or device from the estate of her deceased husband, John W. Mitchell.

(b) That the income determined against petitioner in said EXHIBIT A was not her income but was the income of the Estate of John W. Mitchell, deceased, and was received by the estate of said decedent and not by said Adina Mitchell.

(c) That the said income set forth in said EXHIBIT A was not income but was a return of capital. [34]

(d) That any profits realized through the sale of the property set forth in EXHIBIT A were returned and a tax paid thereon by the said John W. Mitchell or by his estate.

(e) That the property from which the alleged income was realized, as set forth in said EXHIBIT A, was not at any time joint tenancy property but title thereto stood at all times in the name of John W. Mitchell.

(f) That the Commissioner is without authority to issue his sixty day letter, to wit, EXHIBIT A herein. That the period of limitation for assessment or collection of said tax has heretofore ceased and by reason of the limitations of Section 277 of the 1926 Revenue Act, any rights to assess or collect the tax which the respondent might at any time have had are barred.

6. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Prior to April 1, 1924, title to certain real property stood in the name of a banking institution in Los Angeles, California, and was then conveyed by it to Title Guarantee and Trust Company, a corporation of Los Angeles, which executed two revocable Declarations of Trust reciting that title was held in the name of John W. Mitchell. Thereafter, and prior to April 1, 1924, Mr. Mitchell sold most of the property and received therefor three promissory notes secured by deeds of trust. These notes were all payable to John W. Mitchell, who deposited them with Title Guarantee and Trust Company as security for advances made and to be thereafter made by it to him. These notes were never held [35] by said Trustee under its

Declarations of Trust, but at all times since the date of their execution and delivery were held by it as collateral security for loans, which are in part yet unpaid.

(b) The income which the Government is attempting to tax in these proceedings is income derived from payments on the principal of these promissory notes, all of which was either paid to John W. Mitchell prior to July 2, 1925, the date of his death, or thereafter to his estate.

(c) That on April 1, 1924, John W. Mitchell and Adina Mitchell, his wife, executed a certain instrument which recited that all of the properties held by Title Guarantee and Trust Company as trustee should be held in trust for John W. Mitchell and Adina Mitchell, his wife, as joint tenants; but that at the date of the execution of said instrument the only property which Title Guarantee and Trust Company held under the said Declarations of Trust theretofore made was a small portion of the real estate originally conveyed, practically all of which is still held by said company as trustee. That said instrument did not affect the notes from which the income set forth in EXHIBIT A was realized. Further, said agreement, in so far as it attempts to create an estate in joint tenancy, petitioner avers is void.

WHEREFORE, petitioner prays that this Honorable Board may hear and redetermine the tax liability herein [36] alleged, and by its judgment grant

to said petitioner the relief herein asked.

CLAUDE I. PARKER
and
RALPH W. SMITH
Attorneys for Petitioner,
808 Bank of America Building,
Los Angeles, California.

Of Counsel:
L. A. LUCE, Esq.,
937 Munsey Building,
Washington, D. C. [37]

State of California
County of Los Angeles—ss.

DOUGLAS L. EDMONDS, hereby duly sworn, says that he is the Administrator de bonis non of the Estate of Adina Mitchell, deceased, and the petitioner above named; that he has read the foregoing petition, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief and those facts he believes to be true.

DOUGLAS L. EDMONDS

Subscribed and sworn to before me this 29th day of March, 1933.

[Seal] MARGUERITE LE SAGE
Notary Public in and for the County of Los Angeles, State of California. [38]

EXHIBIT A.

TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal
Revenue
Adress reply to
Commissioner of Internal Feb 4 1933
Revenue and refer to
IT:AR:E-1
AEF-60D

Estate of Adina Mitchell,
c/o Douglas L. Edmonds, Administrator,
808 Bank of America Building,
Los Angeles, California.

Sirs:

The determination of the income tax liability of Mrs. Adina Mitchell, deceased, for the year 1925, discloses a deficiency of $17,600.17 and penalty of $4.400.04.

In accordance with Section 274 of the Revenue Act of 1926, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the atten-

tion of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier; WHEREAS IF THIS FORM IS NOT FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By W. T. SHERWOOD,
Acting Deputy Commissioner.

Enclosures:
Statement
Form 870 [39]

STATEMENT

| | |
|---|---|
| Normal tax at 1½% on $4,000.00 | $ 60.00 |
| Normal tax at 3% on $4,000.00 | 120.00 |
| Normal tax at 5% on $95,493.20 | 4,774.66 |
| Surtax on $104,993.20 | 12,658.64 |
| Total income tax liability | $17,613.30 |
| Less: | |
| Credit for earned income | 13.13 |
| Correct income tax liability | $17,600.17 |
| 25% penalty | $ 4,400.04 |

| | Tax | Penalty |
|---|---|---|
| Correct liability | $17,600.17 | $ 4,400.04 |
| Previously assessed | None | None |
| Deficiency (including the deficiency of $7,086.97 shown in sixty-day letter dated April 16, 1932, but not yet assessed) | $17,600.17 | $ 4,400.04 |

The credit of earned income has been computed on the basis of $5,000.00.

The penalty of 25% has been asserted under the provisions of Revised Statutes 3176. [40]

STATEMENT

IT:AR:E-1
AEF-60D

In re: Estate of Adina Mitchell,
c/o Douglas L. Edmonds, Administrator,
808 Bank of America Building,
Los Angeles, California.

INCOME TAX LIABILITY

| Year | Income Tax Liability | Income Tax Assessed | Deficiency | 25% Penalty |
|---|---|---|---|---|
| 1925 | $17,600.17 | None | $17,600.17 | $4,400.04 |

Information available to this office indicates that during the period January 1 to July 2, 1925, Mrs. Adina Mitchell was the owner of one-half of the

beneficial interest of Trusts 750, 807 and 822 and that after July 2, 1925 she was the sole owner by right of survivorship of the beneficial interest of Trusts 807 and 822, Trust 750 having been closed in April, 1925. The income from these trusts was received through Trust 822B.

Her income and tax liability for the calendar year 1925 have been determined as follows:

| | |
|---|---|
| Net income from Trust 822— | |
| January 1 to July 2, 1925 | $52,724.82 |
| Net income from Trust 822— | |
| July 3 to December 31, 1925 | 26,362.41 |
| 50% of profit on collections through Trust 807 from January 1 to July 2, 1925 | 8,690.45 |
| 100% of realized collections through Trust 807 from July 3 to December 31, 1925 | 10,683.33 |
| 50% of income from Trust 750, January 1 to July 2, 1925 | 6,532.19 |
| Correct net income | $104,993.20 |

COMPUTATION OF TAX

| | |
|---|---|
| Correct net income | $104,993.20 |
| Less: | |
| Personal exemption | 1,500.00 |
| Balance subject to normal tax | $103,493.20 |

[Endorsed]: Filed Apr. 3, 1933. [41]

[Title of Court and Cause—Docket No. 70861.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this petitioner, admits and denies as follows:

1, 2, 3, & 4. Admits the allegations contained in paragraphs 1, 2, 3 and 4 of the petition.

5. (a) to (f) Denies the allegations of error contained in subdivisions (a) to (f) inclusive of paragraph 5 of the petition.

6. (a) to (c) Denies the allegations of fact contained in subdivisions (a) to (c) inclusive of paragraph 5 of the petition.

7. Denies generally and specifically each and every allegation contained in the petitioner's petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal of the petitioner be denied.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

JOHN D. KILEY,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed May 31, 1933. [42]

[Title of Court and Cause—Docket Nos. 47516, 66584, 70861.]

STIPULATION OF FACTS.

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the above-entitled appeals may be consolidated for hearing and decision.

In the appeal of John W. Mitchell Estate, Adina Mitchell, executrix, Docket No. 47516, it is stipulated that Douglas L. Edmonds, as Administrator De Bonis Non may be substituted as party petitioner, Mrs. Adina Mitchell having died on April 20, 1931.

It is further stipulated and agreed that the deficiency due from the petitioner in Docket No. 47516 for the year 1924, is in the amount of $4,048.04, and that the Board may enter its order of redetermination accordingly.

It is further stipulated that the said deficiency may be assessed and collected immediately after the issuance of the Board's order of redetermination without regard to the restrictions, if any, [43] contained in the Revenue Acts of 1926, 1928 and 1932.

It is further stipulated that the following facts may be considered as true:

Petitioner is the Administrator de Bonis non of the Estate of John W. Mitchell, deceased, who died on July 2, 1925, and is also the Executor of the Estate of Mrs. Adina Mitchell who died April 20, 1931.

John W. Mitchell and Adina Mitchell were married in Los Angeles in 1888, and John W. Mitchell practiced his profession as a lawyer in that city

until about 1921, when he retired. At the time of their marriage Mrs. Mitchell had as her separate property the sum of $10,000.00 and subsequently inherited an additional sum of $1,676.27. These funds were used to purchase land at Vermont Avenue and Beverly Boulevard, Los Angeles, California, title to which was taken in the name of Adina Mitchell. A home was erected on this property and it was occupied by Mr. and Mrs. Mitchell for many years.

During the period from 1888 to March 1, 1913 John W. Mitchell purchased and took title to two certain parcels of real estate in or near Los Angeles. The source of the funds used in paying for such properties is not known.

In 1915 the Los Angeles Trust and Savings Bank, which had made large loans to Mr. Mitchell, demanded additional security and there was deeded to that bank all of the real estate purchased by Mr. Mitchell and the home property on Vermont Avenue which had stood in the name of Mrs. Mitchell.

In 1921 John W. Mitchell arranged with King C. Gillette for a loan to pay off a portion of his indebtedness to the Pacific Southwest Savings Bank, formerly the Los Angeles Trust and Savings Bank [44] and to secure the loan from Mr. Gillette caused the bank to convey to Title Guarantee and Trust Company the said Vermont Avenue property, title to which was taken by Title Guarantee and Trust

Company under a Declaration of Trust numbered 750, a copy of which is annexed hereto marked Exhibit "A". In the following year Mr. Mitchell caused the bank to convey to Title Guarantee and Trust Company the two other parcels of real estate consisting of 135 acres of land in Cahuenga Pass, and beach property at Santa Monica, California, to secure a loan to pay off the balance of his indebtedness to Pacific Southwest Trust and Savings Bank. Title to both parcels of property was taken by Title Guarantee and Trust Company under its Declaration of Trust numbered 822, a copy of which is annexed hereto marked Exhibit "B". Title Guarantee and Trust Company also issued its Declaration of Trust No. 807, covering a portion of the property described in Declaration of Trust No. 822, a copy of which is annexed hereto marked Exhibit "C".

In the year 1923 Mr. Mitchell authorized the Title Guarantee and Trust Company to sell all of the Cahuenga acreage, title to which was conveyed to F. A. Hartwell in two separate parcels, the first of 115 acres in consideration of the sum of $345.-000.00, of which $50,000.00 was paid in cash with a note for $295,000.00, secured by a deed of trust, evidencing the balance; and the second parcel of 20 acres in consideration of the sum of $110,000.00, of which $20,000.00 was paid in cash with a note for $90,000.00, secured by a deed of trust evidencing the balance.

Each of these notes was made payable to John W. Mitchell. [45]

On April 1, 1924, the Title Guarantee and Trust Company issued a Declaration of Trust under number 822-B, a copy of which is hereto attached and marked Exhibit "D".

At that time Title Guarantee and Trust Company held title to the remaining portion of the real estate described in Declaration of Trust No. 822 not theretofore conveyed to Hartwell or the Los Angeles Stone Company.

At the times the two notes made by F. A. Hartwell hereinbefore mentioned, and the note made by Los Angeles Stone Company to the order of John W. Mitchell, referred to in Declaration of Trust No. 807, were executed and delivered by the payees thereof, said John W. Mitchell deposited them with Title Guarantee and Trust Company as collateral security for the payment of certain indebtedness then owing by him to it. Said notes continued to be held by said Title Guarantee and Trust Company during the taxable periods here in question.

Upon the death of John W. Mitchell, on July 2, 1925, Mrs. Mitchell was appointed as Executrix of his estate and as Executrix she filed a return for the decedent for the period January 1 to July 2, 1925, and as such Executrix for subsequent income tax periods, to wit: July 3, 1925 to December 31, 1925, and for the years 1926, 1927, and 1928. No separate return was filed by Mrs. Mitchell for the year 1925.

In 1930, without the knowledge or consent of Mrs. Adina Mitchell, delinquent returns were pre-

pared for Mrs. Mitchell, signed by a Deputy Collector for the period July 2nd to December 31st, 1925, and for the years 1926 and 1927. These returns are stamped as received by the Collector of Internal Revenue for the Sixth District of California on February 7, 1930. [46]

For the year 1928, without the knowledge or consent of Mrs. Mitchell, a delinquent return was prepared for Mrs. Mitchell, signed by a Deputy Collector, which is marked received by the Collector of Internal Revenue for the Sixth District of California on November 4, 1930.

Said delinquent returns were prepared and filed by the Deputy Collector after audit of the returns prepared and filed by the said Adina Mitchell as Executrix of the Estate of John W. Mitchell, deceased, the office of the Collector of Internal Revenue taking the position that the income resulting during said taxable periods was the personal income of Mrs. Mitchell and not the income of the estate of her husband.

The net taxable income on the note of the Los Angeles Stone Company for the years 1925 and 1926 was as follows:

| | |
|---|---|
| 1925, to July 2nd | $11,586.12 |
| 1925, from July 2nd to December 31st | 7,121.51 |
| and for 1926 | 6,080.39. |

In Declaration of Trust No. 750 the net distributive income for the year 1925 prior to the death of

John W. Mitchell was $24,102.50. This Trust was closed in April, 1925, no income being received thereafter.

The net taxable income realized from payments made on the notes of F. A. Hartwell and the sale of property mentioned in the next paragraph for the year 1925 was the sum of $100,969.10, which was credited on the books of trust #822 of which amount the sum of $50.585.55 was received prior to July 2nd, 1925 and the balance, or the sum of $50,484.55, was received between the periods of July 2nd, 1925 and December 31, 1925.

That immediately following the death of John W. Mitchell, Title Guarantee and Trust Company conveyed a portion of the property [47] to which it held title under Declaration of Trust No. 822 for a total consideration of $87,124.00, less commission and selling expenses of $5,975.25, which consideration was paid in cash at said time. That if the March 1, 1913 value of said property is material to a determination of the net taxable income resulting from said sale, it was the sum of $14,521.39.

For the years 1926, 1927, and 1928, net taxable income was realized from the said F. A. Hartwell notes as follows:

| | |
|---|---|
| 1926 | $43,143.10 |
| 1927 | $39,740.10 |
| 1928 | $45,699.55. |

That there was no change in the fair market value of any of the real or personal property in-

volved in the said taxable periods from date of death to date of the realization of the income therefrom.

It is further stipulated and agreed that a Federal Estate tax return was filed for John W. Mitchell, deceased, the date of death being July 2, 1925, and a copy of which is hereto attached marked Exhibit "E". A deficiency in Federal Estate tax was determined by the Commissioner, as disclosed by the deficiency letter, a copy of which is hereto attached and marked Exhibit "F". Subsequently, an adjustment to the determination of the Commissioner was made whereby a deficiency in Federal Estate tax was stipulated to be $2,589.55 as disclosed by a computation hereto attached, and marked Exhibit "G".

That the March 1, 1913 value of the properties herein referred to as being sold prior to the death of John W. Mitchell was as follows: [48]

| | |
|---|---|
| Vermont Avenue | $166,600.00 |
| Cahuenga Acreage | $145,000.00 |
| Beach Property | $ 14,521.39. |

It is further stipulated and agreed that the above-entitled appeals may be stipulated on the foregoing statement of facts, no further evidence to be introduced by either party.

RALPH W. SMITH,
Counsel for Petitioners.

E. BARRETT PRETTYMAN,
WBI
General Counsel, Bureau of Internal Revenue, Counsel for Respondent. [49]

EXHIBIT "A".

Enclosure for Bureau.

DECLARATION OF TRUST.

Trust #750.

THIS DECLARATION OF TRUST made this 21st day of November, A. D. 1921.

WITNESSETH:

THAT WHEREAS, KING C. GILLETTE and ALANTA E. GILLETTE, his wife, by deed dated November 15th, 1921, conveyed to TITLE GUARANTEE AND TRUST COMPANY, a corporation, organized and existing under and by virtue of the laws of the State of California, the following described real property situated in the City of and County of Los Angeles, State of California, to-wit:

That portion of the North East quarter of the North East quarter of Section Twenty-four (24), Township One (1) South, Range Fourteen (14) West, S. B. M., described as follows:

Beginning at a point in the East line of said Section, distant Forty (40) feet South from the North East corner thereof, said point being the intersection of the center line of Vermont Avenue, with the prolongation of the South line of Temple Street, as conveyed to the City of Los Angeles, by deed recorded in Book 5606, Page 25 of Deeds, Records of said County; thence south along the center line of Vermont Avenue, Twelve Hundred Sixteen (1216) feet

to the intersection of said center line with the prolongation of the North line of West First Street, as conveyed to the County of Los Angeles, by deed recorded in Book 918, Page 290 of said Deed Records; thence West Three Hundred Fifty (350) feet to the East line of New Hampshire Street, as conveyed to the City of Los Angeles, by deed recorded in Book 5562, Page 247 of said Deed Records; thence North along said New Hampshire Street, Twelve Hundred Sixteen (1216) feet to the South line of Temple Street; thence East Three Hundred Fifty (350) feet to the point of beginning.

AND WHEREAS said property was conveyed to the TITLE GUARANTEE AND TRUST COMPANY, hereinafter referred to as the Trustee, free and clear of all incumbrances, except that certain mortgage in the sum of $85,000.00, dated June 28th, 1920, due June 28th, 1923, in favor of Security Trust and Savings Bank, recorded in Book 4629, Page 119 of Mortgages, Records of Los Angeles County, California.

AND WHEREAS, although title has heretofore been vested in the name of King C. Gillette, John W. Mitchell has an interest therein, as hereinafter more particularly set forth.

AND WHEREAS the said KING C. GILLETTE and JOHN W. MITCHELL are preparing for record a map of said property to be known and

designated as the John W. Mitchell Home Tract, a subdivision consisting of twenty-two lots as shown and designated in a plat hereto attached marked "Exhibit "A", and whereas the said KING C. GILLETTE and JOHN W. MITCHELL contemplate placing said lots on the market at once and to that end have entered into a certain agency agreement with one L. A. Dolton, a copy of which said agreement is [50] hereto attached marked "Exhibit "B", and in order to expedite such sales and to more fully define the interests of said King C. Gillette and John W. Mitchell have caused the deed hereinbefore referred to to be made in favor of the TITLE GUARANTEE AND TRUST COMPANY, upon the trusts and confidences hereafter set out.

AND WHEREAS the said KING C. GILLETTE, by reason of a consideration which has heretofore passed to the said JOHN W. MITCHELL, is entitled to one-half of the net proceeds realized from the sale of said property, whether by reason of the foregoing agency agreement or otherwise, after first having paid the following items:—

(1) The fees, costs and expenses of the Title Guarantee and Trust Company, hereafter referred to as the Trustee, for its services as Trustee under the Trust hereinafter declared, and for its other necessary expenses in connection with the sale of the property.

(2) Security Trust and Savings Bank, the amount necessary to release lots when sold from the lien of its mortgage, a schedule of said release prices being hereto attached marked "Exhibit "C".

(3) Pay L. A. Dalton his commission as provided in the agency agreement hereto attached marked "Exhibit "B".

(4) Pay the expenses of grading and improving said tract in sums hereinafter to be approved by the said KING C. GILLETTE and JOHN W. MITCHELL, and also for the payment of any taxes, liens or assessments which shall hereafter accrue against said property before the same shall become delinquent, unless sold subject thereto.

(5) Pay John W. Mitchell the entire balance of principal and interest received from the sale of said property until the amount thereof shall aggregate the sum of $65,000.00.

NOW THEREFORE THIS IS TO WITNESS, that the Trustee hereby declares that it holds said property in Trust for KING C. GILLETTE and JOHN W. MITCHELL upon the terms and conditions hereinbefore provided for the purpose of selling said property and to that end executing deeds and accepting mortgages and of disbursing the proceeds realized therefrom as hereinbefore provided, and for such other purposes as are herein set forth, to all of which terms said KING C. GILLETTE and JOHN W. MITCHELL, hereinafter referred to as the [51] Beneficiaries, hereby agree and bind themselves, their heirs, administrators, executors and assigns as fully as though directly made parties hereto.

THE PROVISIONS OF THIS TRUST ARE AS FOLLOWS:—

(1) The Beneficiaries shall pay or cause to be paid before the same shall become delinquent any and all taxes, liens or assessments levied, assessed or to become due against said property including the expenses of subdividing and improving the streets, etc., *their* being no liability upon the Trustee to pay the same nor to enter into possession of said property, nor to perform any duties than as otherwise herein specifically provided

(2) The Trustee shall subscribe to the map, a copy of which is hereto attached marked "Exhibit "A", dedicating to public use, streets and alleys shown thereon, and after such subdivision has been duly recorded, shall sell lots to purchasers in accordance with the terms of the agency agreement hereto attached marked "Exhibit "B", and if for any reason the said sales agency shall become terminated, the Trustee shall sell upon the joint order of the Beneficiaries and upon such terms as they shall designate.

All moneys realized from the sale of said property shall be paid to the Trustee and shall be by it disbursed as herein provided. Building restrictions shall be imposed by the Trustee upon said lots, as the Beneficiaries shall hereafter direct. The proceeds realized from the sale of lots shall be by the Trustee disbursed as in the preamble hereof provided. Instead of filing one map as shown by "Exhibit A",

two or more maps may be filed if so requested by JOHN W. MITCHELL.

The fees of the Trustee for conducting this Trust are hereby fixed as follows:—

(a) For installing the said Trust, the sum of $100.00

(b) For drawing deeds and other instruments, $2.00 each.

(c) For the collection of moneys, 1% of the sale price of the property and interest thereon.

(d) Should any uncontemplated or unforseen service be required not provided for herein which may be necessary to carry out the provisions of this Trust, then there shall be payable to the Trustee by the Beneficiaries a fair and reasonable charge for the performance of such duties. [52]

The Beneficiaries shall furnish Certificates of Title to purchasers at their own expense. The base search shall be written for $50.00 and separate guarantees on lots shall be at the following rates:—

(a) $5.00 for a guarantee containing one lot or fraction of a lot, providing the value does not exceed $1000.00.

(b) On lots valued at more than $1000.00 and not exceeding $3000.00 guarantees will be furnished for $7.50.

(c) If the value of the lot exceeds $3000.00 a charge of $2.50 for each thousand dollars or fraction in excess of said $3000.00 will be added to the $7.50 charge above mentioned.

(d) An additional charge of $1.00 will be added for each lot or fraction in addition to the first lot described in the guarantee.

IN WITNESS WHEREOF, the TITLE GUARANTEE AND TRUST COMPANY, a corporation, as aforesaid, has caused this Declaration of Trust to be duly executed, the name of the corporation being duly signed by its Vice-President and attested by its Assistant Secretary, under its corporate seal, the day and year first above written.

TITLE GUARANTEE AND TRUST COMPANY

By D. W. PEAK
Vice-President

Attest: A. R. KILLGORE
Assistant Secretary [53]

The undersigned BENEFICIARIES do hereby certify and declare that the foregoing Declaration of Trust fully sets out and discloses the terms under which said described property is held in Trust by TITLE GUARANTEE AND TRUST COMPANY, and hereby approve, confirm and ratify the same in all its part, and hereby bind themselves, their heirs and assigns by the terms thereof.

Dated at Los Angeles, California, this 26th day of November, A. D. 1921.

KING C. GILLETTE
JOHN W. MITCHELL

THIS IS TO CERTIFY that the foregoing is a full, true and correct copy of Declaration of Trust

No. 750 on file in the Trust Department of Title Guarantee and Trust Company.

TITLE GUARANTEE AND TRUST COMPANY

By E. W. FRANKLIN

Vice-President. [54]

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EXHIBIT "B"

DECLARATION OF TRUST

Trust #822

THIS DECLARATION OF TRUST made this 14th day of December, A. D. 1922.

WITNESSETH:

THAT WHEREAS, PACIFIC SOUTHWEST TRUST & SAVINGS BANK, (formerly Los Angeles Trust & Savings Bank) a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business at Los Angeles, California, conveyed to TITLE GUARANTEE AND TRUST COMPANY, a corporation likewise organized and existing, all that certain real property in the County of Los Angeles described as follows, to-wit:—

That portion of Lot One (1) of the Replat of a portion of the property of the Lankershim Ranch Land and Water Company, as per map recorded in Book 66, Page 83 et seq., Miscell-

aneous Record of said County, described as follows:—

Beginning at a point in the Southerly line of Los Angeles and Ventura County Road at the most Northerly corner of the land conveyed to Meta B. Parkinson, by deed recorded in Book 3443, Page 206 of said Deed Records; thence along the Southerly line of said Road, North Fifty-two degrees (52°) Forty-four minutes (44′) Thirty Seconds (30″) West, Eight Hundred Seventy-two and Seventy-four Hundredths (872.74) feet more or less to an angle point therein; thence still along the Southerly line of said Road, North Sixty-five degrees (65°) Two minutes (2′) Thirty seconds (30″) West, Two Hundred Twenty-three and Twenty-two Hundredths (223.22) feet to an angle point thereon; thence still along the Southerly line of said Road North Seventy-four degrees (74°) Forty minutes (40′) Thirty seconds (30″) West, Nine Hundred Twenty-six and Sixteen Hundredths (926.16) feet to an angle point in said Road; thence leaving said road and running in a Southerly direction Twenty-six Hundred Thirty-five (2635) feet to a point in the Southerly line of said Lot One (1), distant along said line North Eighty-six degrees (86°) Fifty-seven minutes (57′) West, Seventeen Hundred and Ten (1710) feet from the South West corner of the land conveyed to Meta Parkinson, by deed recorded in Book 3405, Page 299 of Deeds;

thence along said Southerly line South Eighty-six degrees (86°) Fifty-seven minutes (57′) East, Seventeen Hundred and Ten (1710) feet to the said South West corner of the land conveyed to Meta Parkinson; thence along the Westerly line of the land so conveyed to Meta Parkinson North Twelve degrees (12°) Forty-three minutes (43′) East, Fourteen Hundred Three and Fifty Hundredths (1403.50) feet to the most Southerly corner of the land conveyed to Meta B. Parkinson, by deed recorded in Book 3443, Page 206 of said deed Records; thence North Westerly Five Hundred (500) feet more or less, to the point of beginning. [55]

That portion of said Lot One (1) of the Replat of a portion of the property of the Lankershim Ranch, Land and Water Company, described as follows:—

Beginning at an angle point in the Southerly line of the Los Angeles and Ventura County Road at the most Northerly corner of the land conveyed to John W. Mitchell, by deed recorded in Book 4141, Page 29 of Deeds; thence South Fifty-one degrees (51°) Thirty-one minutes (31′) West, Thirteen Hundred Forty-seven (1347) feet; thence South Twenty-nine degrees (29°) Seventeen minutes (17′) East, Seven Hundred Two (702) feet, more or less, to a point from which an oak tree bears North Sixty degrees (60°) Forty-three minutes (43′)

East, Forty (40) feet distant; thence South Twenty-three degrees (23°) Thirty-two minutes (32′) East, Twelve Hundred Seventy-six (1276) feet, more or less, to a point in the Southerly line of said Lot One (1); thence along said Southerly line South Eighty-six degrees (86°) Fifty-seven minutes (57′) East, One Hundred Twenty-two (122) feet more or less to a point which is distant North Eighty-six degrees (86°) Fifty-seven minutes (57′) West, Seventeen Hundred Ten (1710) feet from the South West corner of the land conveyed to Meta Parkinson, by deed recorded in Book 3405, Page 299 of Deeds; thence Northerly Twenty-six Hundred Thirty-five (2635) feet, more or less, to the point of beginning.

All that certain real property situate in the City of Santa Monica, County of Los Angeles, State of California, described as follows:

That portion of the Rancho San Vicente y Santa Monica beginning at a point in the South Westerly line of the twenty (20) foot strip of land conveyed to the City of Santa Monica, by deed recorded in Book 4530, Page 152 of Deeds, distant along said line, One Hundred Ten and Ten Hundredths (110.10) feet North Westerly from the North Westerly line of the Sunset Beach Tract, as per map recorded in Book 83, Page 10, Miscellaneous Records of said County; thence North Forty-five degrees (45°) Fifteen minutes (15′) East, Two Hundred Twenty-three (223) feet to a

point in the South Westerly line of Ocean Avenue; thence along said South Westerly line North Forty-four degrees (44°) Forty-five minutes (45′) West, Eleven Hundred Ninety-eight and Seventy-four Hundredths (1198.74) feet to the true point of beginning; thence along said South Westerly line of Ocean Avenue North Forty-four degrees (44°) Forty-five minutes (45′) West, Seventeen Hundred Sixteen and Eighteen Hundredths (1716.18) feet; thence parallel with Idaho Avenue South Forty-five degrees (45°) Fifteen minutes (15′) West. Four Hundred Seventy-five and Seventy-one Hundredths (475.71) feet, more or less, to the ordinary high tide line of the Pacific Ocean; thence South Easterly along said ordinary high tide line, Seventeen Hundred Eighteen (1718) feet, more or less, to a point in said ordinary high tide line, which bears South Forty-five degrees (45°) Fifteen minutes (15′) West from said true point of beginning; thence parallel with said Idaho Avenue North Forty-five degrees (45°) Fifteen minutes (15′) East to the true point of beginning.

EXCEPTING therefrom that portion of said tract lying between the South Westerly line of Ocean Avenue and the upper contour line of the bluffs as set aside to the City of Santa Monica for park purposes by decree had in Case No. 14541 S. C. of said County.

EXCEPTING therefrom that portion of said tract lying between the South Westerly line of Ocean Avenue and the upper contour line of the bluffs as set aside to the City of Santa Monica for park purposes by decree had in Case No. 14541 S. C. of said County.

ALSO EXCEPTING therefrom the Fifty (50) foot right of way conveyed to the S. P. R. R. Co. by deed recorded in Book 763, Page 184 of Deeds, and [56]

WHEREAS a portion of the property hereinbefore described, situated in the City of Santa Monica, is held in Trust under and by virtue of the terms of Trust #807 of Title Guarantee and Trust Company, and all the remainder of the property hereinbefore described is held in Trust subject to the terms hereof, and

WHEREAS the said property conveyed by PACIFIC SOUTHWEST TRUST & SAVINGS BANK to TITLE GUARANTEE AND TRUST COMPANY, hereinafter referred to as the Trustee, although absolute in form was nevertheless made in Trust, said property having hitherto been held in Trust by Pacific Southwest Trust & Savings Bank for JOHN W. MITCHELL, and the conveyance to the Trustee herein was made at the request of and for the benefit of the said JOHN W. MITCHELL, hereinafter referred to as the Beneficiary, subject to all the terms of this Trust, and

WHEREAS the Beneficiary has borrowed and received of L. C. BRAND, hereinafter referred to as the Lender, the sum of Sixty-eight Thousand ($68,000.00) Dollars, which said indebtedness is evidenced by a note in words and figures as follows, to-wit:—

Los Angeles, California,
December 14th, 1922.

$68,000.00

Three (3) years after date and for value received, we or either of us promise to pay to L. C. BRAND or order, at Los Angeles, California, the sum of Sixty-eight Thousand ($68,000.00) Dollars, with interest from date until paid at the rate of seven per cent (7%) per annum, payable quarterly.

Should the interest not be so paid it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States.

This note is secured by assignment of all our right, title and interest in and to Trust #750, #807 and #822 respectively, of Title Guarantee and Trust Company.

(Signed) JOHN W. MITCHELL
ADINA MITCHELL

NOW THEREFORE THIS IS TO WITNESS that the Trustee holds and shall continue to hold title to the hereinbefore described property in Trust for the Beneficiary and for the Lender for the purpose of [57] securing the payment of the indebtedness evidenced by the above note, and also as security for any other indebtedness of the Beneficiary to the Lender or the Trustee, whether evidenced by a note or otherwise, and to secure the payment of any and all costs and expenses incurred in connection therewith and in the collection thereof, and for any advancements made by the Trustee or the Beneficiary for the care or protection or benefit of the property so held in Trust, together with any attorneys fees or other charges incurred by the Lender or the Trustee in connection with the enforcement of the payment of said indebtedness.

Said property is also held in Trust for the purpose of making sale of said property or any part thereof and of subdividing the same and of receiving and disbursing proceeds realized therefrom, and for such other purposes as are herein set forth, on the following terms and conditions, and to those ends all of the parties by their written approval hereof agree and bind themselves, their heirs, executors, administrators, successors and assigns.

THE PROVISIONS OF THIS TRUST ARE AS FOLLOWS:

FIRST: The Beneficiary shall pay to the Trustee for the account of the Lender the sum of Sixty-

eight Thousand ($68,000.00) Dollars and interest in accordance with the terms of the note hereinbefore set out, and also any other indebtedness of the Beneficiary payable to the Lender or the Trustee whether evidenced by a note or otherwise, together with any and all costs and expenses incurred in connection therewith and in the collection thereof, and for any advancements made by the Trustee or the Beneficiary for the care or protection or benefit of the property so held in Trust, together with attorneys' fees or other charges incurred by the Lender or the Trustee, together with interest on any of the said sums.

SECOND: The Beneficiary shall pay before delinquent all taxes, [58] liens and assessments of every kind and nature, levied, assessed or to become due against said property. In event of the nonpayment of any such taxes, assessments or liens the Lender or the Trustee may at their option and without notice pay the same and may thereupon demand the immediate re-payment of all sums so advanced, which sums so advanced shall draw interest until paid at the rate of ten per cent (10%) per annum. This provision however shall impose no obligation upon either the Lender or the Trustee to make any such payment.

THIRD: The Trustee at the request of the Beneficiary shall sell the said property or parts thereof at such prices and upon such terms as the Beneficiary shall direct, provided however that the same shall be an amount satisfactory to and approved by

the Lender, his heirs or assigns. All moneys realized from any such sale or sales shall be paid by purchasers thereof to the Trustee, and after the payment of fees, costs and expenses of the Trust, shall be by the Trustee applied to the discharge of the indebtedness or obligations of the Lender secured hereby. Upon payment in full of the indebtedness secured hereby and the discharge of all the other obligations hereunder all right, claim or interest of the Lender hereunder shall cease and be discharged, and the Trustee shall thereupon hold the entire remaining assets of this Trust for the Beneficiary, his heirs or assigns.

FOURTH: Should default be made in the payment of any installment of principal or interest secured hereby when due, or should the Beneficiary fail to do or perform any of the other things provided to be done by the terms hereof, then said Lender, his heirs, executors, administrators or assigns, may declare all of the indebtedness secured hereby due and payable at once, and may cause to be filed in the office of the County Recorder of said Los Angeles County, a notice that the debt is due and unpaid, and that he elects to have part or all of the property described in the deed of trust sold to satisfy the said debt, and three months after filing of said notice the said Trustee may and [59] shall upon demand of the Lender proceed to sell the above described property or any part thereof, as said Trustee, its successors or assigns shall in its discretion find it necessary to sell in order to accom-

plish the objects of this Trust in the manner following, viz:

Said Trustee, its successors or assigns shall first publish notice of the time and place of such sale with a description of the property to be sold at least once a week for three successive weeks in some newspaper of general circulation, printed and published in the County of Los Angeles, State of California, and notice of such sale shall be posted complying with the laws of the State of California, governing sales under execution and may from time to time for one or several days postpone such sale by publication by republishing the notice of sale in the same newspaper and the date of postponement of sale, and on the date of sale so advertised, or any date to which such sale shall be postponed, said Trustee, its successors or assigns, may sell the property so advertised, the whole or any part thereof, at public auction in the City of Los Angeles, California, to the highest bidder, and the Lender herein, his heirs and assigns, or the holder or holders of said promissory notes to be executed by said Beneficiary, his agent or assigns, may bid and purchase on such sale, and said Trustee, its successors or assigns, may establish as one of the conditions of such sale that all bids and payments for the said property shall be made in like gold coin as aforesaid, and upon such sale shall make, execute and after due payment made, deliver to the purchaser or purchasers, or their heirs or assigns, a deed or deeds of grant, or a deed in any form it may

select, conveying so much of the above granted property as is sold, and out of the proceeds thereof shall pay:

1st. The expenses of such sale, together with all the expenses of this Trust, including counsel fees, if the same be necessary, all advances made in protection hereof, and interest on any payments so made.

2nd. The principal and interest unpaid on the indebtedness secured hereby. [60]

3rd. The balance or surplus of such proceeds, if any, to the Beneficiary, his heirs or assigns.

And in the event of the sale of said property or any part thereof, and the execution of a deed or deeds therefor under these Trusts, then the recital thereon of default, publication of notice, sale and receipt of any purchase money, shall be conclusive proof of such default, of the due publication of notice required of sale, that the sale was made to the highest bidder, that the purchase price was paid, and any such deed or deeds with such recital shall be effective and conclusive as against the Beneficiary, his heirs or assigns, and all other persons, and the recital of the receipt of the purchase money contained in any deed executed to any purchaser as aforesaid shall be sufficient discharge to such purchaser of any obligation to see to the proper application of the purchase money according to the Trust herein provided for.

FIFTH: The Beneficiary shall supply at his own cost and expense guarantees of title of Title

Guarantee and Trust Company showing title to all the hereinbefore described property vested in the name of the Trustee, and the Beneficiary hereby represents that the title to said property by the filing of the deed first herein mentioned, will show vested in the name of the Trustee free and clear of all incumbrances except:

1. Taxes for the fiscal year 1922-1923.
2. Reservations, rights of way and easements of record.

When the said property or any portion thereof is conveyed to the Trustee, the Beneficiary shall furnish at his own cost and expense a guarantee issued by Title Guarantee and Trust Company on the part so conveyed.

SIXTH: The fees of the Trustee for its services hereunder are hereby fixed as follows:

(a) For the acceptance hereof the sum of One Thousand ($1000.00) Dollars.

(b) An annual fee of Seven Hundred and Fifty ($750.00) Dollars [61] for every year or fraction thereof during which this Trust shall continue.

(c) In the event the said property or any part thereof is subdivided there shall be paid to the Trustee a reasonable fee for the placing of the same upon its books and installing this phase of the transaction as an elaboration hereof, together with collection fees, as follows:

Where property is sold for cash a two per cent (2%) collection fee, and a fee of two and one-half per cent (2½%) where property is sold upon terms,

the installments of which do not exceed four in number and do not extend beyond a period of three years from date thereof. Where property is sold under less favorable terms a collection fee of three per cent (3%) shall be charged. There shall also be paid to the Trustee its usual and customary fees for the preparation of all instruments necessary in connection with such sales. If parcels of said property are sold before subdivision a fair and reasonable collection fee shall be charged based upon the sale price of the property.

(d) Should any uncontemplated or unforseen services be required not provided for herein which may be necessary to be performed to carry out the provisions of this Trust a fair and reasonable charge shall be made for the performance thereof.

IN WITNESS WHEREOF, TITLE GUARANTEE AND TRUST COMPANY, a corporation as aforesaid, has caused this Declaration of Trust to be duly executed, the name of the corporation being signed by its Vice President and attested by its Secretary, under its corporate seal, the day and year first above written.

TITLE GUARANTEE AND TRUST COMPANY

By A. F. MORLUM

Vice President

Attest: A. R. KILGORE

Secretary [62]

We the undersigned Beneficiaries, do hereby certify and declare that the foregoing Declaration of

Trust fully sets out and discloses the terms under which said described property is held in Trust by the TITLE GUARANTEE AND TRUST COMPANY, and hereby approve, confirm and ratify the same in all its parts, and hereby bind themselves, their heirs and assigns by the terms hereof.

Dated at Los Angeles, California, this ..... day of December, A. D. 1922.

.....

Lender

.....

Owner

I, wife of John W. Mitchell do hereby ratify, approve and confirm the foregoing Declaration of Trust in all its terms and authorize the Trustee to carry out the provisions hereof.

.....

[63]

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DECLARATION OF TRUST

Trust #807

KNOW ALL MEN BY THESE PRESENTS: That by deed dated December 11th, 1922, PACIFIC SOUTHWEST TRUST & SAVINGS BANK, a corporation organized and existing under and by virtue of the laws of the State of California, conveyed to TITLE GUARANTEE AND TRUST COMPANY, a corporation likewise so existing, hereinafter referred to as the Trustee, all that

certain real property situated in the City of Santa Monica, County of Los Angeles, State of California, described as follows, to-wit:

Part of the Rancho San Vicente y Santa Monica, described as follows:

Beginning at a point in the South Westerly line of the strip of land Fifty (50) feet wide conveyed by John P. Jones and Arcadia B. de Baker to the Southern Pacific Railroad Company, by deed recorded in Book 763, Page 184 of Deeds; said point of beginning being the intersection of said line with the North Westerly line of that certain tract of land conveyed by the Santa Monica Land Company, a corporation, to J. B. Lankershim and John W. Mitchell, by deed recorded in Book 4741, Page 183 of Deeds; thence South Forty-seven degrees (47°) Fifteen minutes (15′) East along the South Westerly line of said Fifty (50) foot strip, Fifteen Hundred (1500) feet to a point distant North Forty-seven degrees (47°) Fifteen minutes (15′) West, along said South Westerly line Two Hundred and Seventeen and Eighty-one Hundredths (217.81) feet from the intersection thereof with the South Easterly line of land conveyed by J. B. Lankershim to John W. Mitchell, by deed recorded in Book 6202, Page 204 of Deeds; thence South Forty-five degrees (45°) Fifteen minutes (15′) West, along a line parallel with the South

Westerly prolongation of the North Westerly line of Montana Avenue, Two Hundred Ten (210) feet, more or less, to the line of ordinary high tide of the Pacific Ocean; thence North Westerly along said line of ordinary high tide to a point bearing South Forty-five degrees (45°) Fifteen minutes (15′) West (on a line parallel with said North West line of Montana Avenue prolonged) from the point of beginning; thence North Forty-five degrees (45°) Fifteen minutes (15′) East to the point of beginning,

the above described property constituting a part of the property so conveyed.

WHEREAS as shown by Guarantee #455790 of Title Guarantee and Trust Company said property was conveyed to the Trustee free and clear of all incumbrances except: [64]

(1) Second half taxes for the fiscal year 1922-23.

(2) A right of way for sewer over a strip Ten (10) feet wide parallel with the right of way of the Southern Pacific Railroad and Westerly Twenty-three (23) feet therefrom, granted to the Town of Santa Monica, by deeds recorded in Book 1632, Page 17, and Book 1609, Page 26 of Deeds.

(3) An easement for street purposes over a strip Twenty (20) feet, more or less, wide lying next to and adjoining South Westerly

the Westerly line of S. P. R. R. right of way, granted to the City of Santa Monica, by deed recorded in Book 4530, Page 152 of Deeds.

(4) Whatever rights for street purposes, by reason of certain unrecorded and lost deeds, the City of Santa Monica may have in certain portions of said premises as will appear from Ordinance No. 601 of the Board of Trustees of said City, a certified copy of which is of record in Book 236, Page 237, Miscellaneous Records, reference to which record and the map attached thereto, is made for description of the land claimed and other particulars.

The following notes appear after the description of the property in the aforementioned guarantee issued by Title Guarantee and Trust Company:

As to that portion of said land lying Westerly of the patent boundary lines of the Rancho Vicente y Santa Monica, this guarantee is based upon the assumption that the same was forced by the deposit of alluvium in imperceptible degrees and became and is thereby vested in the owner of the adjoining mainland.

No liability is assumed in respect to the area thereof available as land, and

WHEREAS no consideration was paid by the Trustee individually for the conveyance to it of the property aforesaid, but a portion of such consideration, to-wit: the sum of Twenty-five Thousand ($25,000.00) Dollars of said purchase price has been

paid by the following named parties and in the following proportions, their interests hereunder as beneficiaries being in like proportion:—

Los Angeles Stone Company, an undivided three-twelfths (3/12)

F. E. Bundy, an undivided three-twelfths (3/12)

C. L. Bundy, an undivided two-twelfths (2/12)

R. F. Sherman, an undivided two-twelfths (2/12)

F. M. Siener, an undivided two-twelfths (2/12)

said parties herein referred to as the Buyers, and

WHEREAS there remains an unpaid balance of said purchase price owing and payable to John W. Mitchell by said Buyers in proportion to their ownership herein as hereinbefore set out, the sum of One Hundred and Twenty-five Thousand ($125,000.00) Dollars, evidenced by a note in words and figures as follows, to-wit:— [65]

$125,000.00 Los Angeles, California, December 11th, 1922.

For value received we severally promise to pay JOHN W. MITCHELL or order, in the proportions set opposite our respective names, the sum of One Hundred and Twenty-five Thousand ($125,000.00) Dollars, in installments of Twelve Thousand, Five Hundred ($12,500.00) Dollars each on or before the 15th day of November of every year commencing

November 15th, 1923 at the office of Title Guarantee and Trust Company of Los Angeles, California, until the principal sum hereof is fully paid, all principal unpaid to bear interest from date until paid at the rate of six per cent (6%) per annum, payable semi-annually.

Should the interest not be so paid it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of the principal or interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States.

This note is secured by Declaration of Trust #807 of Title Guarantee and Trust Company.

(Signed) LOS ANGELES STONE CO. 3/12

By .....

[Corporate Seal] President.

Attest: .....

Secretary.

F. E. BUNDY, 3/12
C. L. BUNDY, 2/12
R. P. SHERMAN, 2/12
F. M. SIENER, 2/12

NOW THEREFORE THIS DECLARATION OF TRUST WITNESSETH: that the Trustee certifies and declares that it holds and shall continue to hold said described property and every part

thereof in Trust only upon the terms, conditions and provisions hereinafter specifically set forth, to-wit:—

FIRST: To secure the full payment of said unpaid remainder of said purchase price of said property as hereinbefore provided, payable to the Seller, together with interest thereon at the time and times and in the manner above set out, and also as security for the payment of any and all costs and expenses incurred in connection therewith and in the collection thereof, and for any advancements made by the Trustee or the Seller for the care or protection or benefit of property so held in Trust, together with any attorneys' fees and other charges incurred by the Seller or by the Trustee in [66] connection with the enforcement of the payment of said unpaid remainder of said purchase price.

SECOND: To permit the Trustee acting for the Buyers to subdivide said property or portions thereof into lots, with full authority given the Trustee to subscribe to a map or maps of such proposed subdivision, provided that no part thereof is dedicated to any public use. If any street thereof is to be so dedicated then the Seller must consent to such subdivision. The Trustee however, shall be permitted to sell portions of said property by metes and bounds when so requested to do by the Buyers. If the Buyers shall incur any expenses in improving said property in any way which might subject the same to mechanic's liens, the said Buyers shall hold said property and every part thereof free and harm-

less from any such lien, claim or incumbrance arising or growing out of the installation of such improvements, and the Seller may, if he so elects, use the name of the Trustee and post upon said property a notice required by Section #1192 of the Code of Civil Proceedure of the State of California, relieving said property of liability or lien by reason of such improvements.

THIRD: To release from the lien of said debt, being said unpaid remainder of said purchase price secured as aforesaid by this Declaration of Trust, a lot or lots or parcels by metes and bounds, upon payment to the Trustee for the account of the Seller of a release price hereby fixed at One Hundred ($100.00) Dollars per front foot.

FOURTH: The Trustee shall sell said property or portions thereof and convey the same to purchasers at such prices and upon such terms and conditions of sale as it may be so directed to do by the Buyers, provided however that the said property shall not be sold at a price less than the Seller's release price, and provided further that the Trustee shall in no event make a conveyance of said [67] lot until there are sufficient moneys in its hands for the credit of the Seller to pay the release prices as above provided for such lots so conveyed.

FIFTH: All contracts of sale or deeds for said property or parcels thereof shall be executed by the Trustee, and all moneys realized from the sale of said lots, whether as deposits, first payments or

on contracts or for deeds or from other sources shall be paid only to the Trustee and shall be by it disbursed as follows:—

Where lots are sold for all cash the Seller's release price shall first be paid and the balance thereof shall be paid to the account of the Buyers.

Where lots or parcels are sold under agreements of sale the first twenty per cent (20%) of the sale price shall be paid to the Buyers and thereafter all payments of principal shall be divided one-half to the Buyers and one-half to the Seller until such time as the Seller's release price, so hereinbefore provided, has been fully paid, provided however that no moneys shall at any time be paid to the Buyers provided that by so doing sufficient would not remain unpaid under any contract to fully satisfy the Seller's release price. As long as there is no default in any of the terms hereof on the part of the Buyers, all interest collected under agreements of sale shall be paid to such Buyers.

SIXTH: The Buyers shall be privileged to take possession of all of said property and have the management and control thereof so long as there is no default hereunder, subject however in all matters, to the provisions of this Trust, and may for the purpose of making sale of said lots select and employ such agents or sub-agents as they deem fit, provided same are not objectionable to the Trustee, but any such agent or sub-agent so employed at the request of or with the consent of the Buyers shall be construed to be the agent of the Buyers and not

of the Trustee. The Buyers have specifi-[68]cally covenanted and agreed and do hereby covenant and agree to pay all taxes, liens and assessments of every kind and nature hereafter levied or assessed or to become due against said property including second half taxes for the fiscal year 1922-1923 before the same shall become delinquent, and the failure so to do shall be construed as a default hereunder and in case of such default, either the Seller or the Trustee may, but without any obligation upon either of them so to do, pay such taxes or assessments, and the amount so paid shall be immediately due and payable by the Buyers, together with interest on the amount so advanced at the rate of 10% per annum until paid, and the Buyers hereby agree to repay the amount of any and all advancements made by the Trustee or the Seller for their benefit or for the benefit or on account of said property held as aforesaid, or for improvements to be made thereon, immediately and upon demand, together with such interest thereon aforesaid, and any moneys in the hands of the Trustee realized from the sale of said lots standing to the credit of the Buyers in excess of the respective release prices of respective lots, may be used by the Trustee in its discretion for the payment of interest, taxes, street work or other improvements done upon said property when and as the same shall become due without any specific order of the Buyers to that effect, and the Trustee may pay agents'

commissions out of the moneys realized from the sale of said lots standing to the credit of the Buyers in accordance with such agency agreement as such Buyers may enter into, and the Buyers hereby obligate themselves to pay to the Trustee its fees and charges as hereinafter provided for out of any moneys in the hands of the Trustee realized from the sale of said lots and standing to their credit, and such fees and charges of the Trustee and advancements made by it shall become and constitute a lien upon the Trust property and all funds or securities coming into the hands of the Trustee hereunder standing to the credit of the Buyers, subject always however to the prior lien created hereby in favor of the Seller for the [69] release prices of lots as herein set out and upon failure on the part of the Buyers to pay or repay the Trustee said sums upon demand, or upon the failure to pay the Seller his sums of principal and interest due him or upon their failure to do anything herein provided to be done by them, then the Trustee and Seller or either of them, may at its or his option declare the unpaid principal of said purchase price, together with the interest thereon accrued and unpaid, immediately due and payable and may proceed to foreclose the rights of the Buyers hereunder in the manner hereinafter provided.

SEVENTH: All moneys paid to the Trustee for the credit of the Seller for release prices shall accumulate in the hands of the Trustee and be by it disbursed once a month on or before the fifteenth

day of every calendar month and shall thereupon be disbursed to the Seller to apply upon the principal of his indebtedness, and such payment of principal shall be applied to the payment of principal next falling due under the provisions hereof, and shall be so applied until the indebtedness secured hereby is fully liquidated, and interest on such amount so paid shall cease from the time of such payment thereof of the Trustee to the Seller, and from any moneys other than release prices in the hands of the Trustee for the account of the Buyers, the Trustee may, when due pay to the Seller the amount of interest due such Seller on the unpaid balance of the purchase price secured hereby without any specific order to that effect from the Buyers.

EIGHTH: After full payment of said purchase price and interest thereon has been made to the Seller and any advancements made by him, together with interest thereon aforesaid, then all restraint hereinabove or hereinafter imposed upon the Buyers in the management and sale of said property and improvements made thereon, shall cease and determine and all of said property then remaining shall be sold as directed by the Buyers, and all moneys realized therefrom shall be applied by the Trustee as directed by it. [70]

NINTH: An unlimited certificate of title or guarantee issued by Title Guarantee and Trust Company shall be furnished by the Seller down to the date of transfer to the Trustee showing title vested in the Seller free and clear of all incum-

brances except second half taxes for the fiscal year 1922-1923 and other incumbrances hereinbefore definitely set forth, and when lots or parcels are sold from time to time the Trustee is authorized to procure and deliver at the expense of the Buyers, certificates of title which shall be furnished when deeds are delivered.

TENTH: In the management of said property and sale of said lots the Trustee as regards the Buyers aforesaid is hereby authorized and empowered to act upon the order of the Buyers collectively holding a majority of the beneficial interest hereunder and in and when so acting, any such action on the part of the Trustee shall bind conclusively each and all the Buyers aforesaid as Beneficiaries hereunder, and for the purpose of conducting this Trust, the said majority in interest of beneficiaries may designate and select an executive committee consisting of any number of persons to represent all of said beneficiaries and the Trustee upon acting upon the authority of said executive committee so designated by such majority in interest of said beneficiaries shall be as fully protected as though acting upon the instructions of all of such beneficiaries and until a notice in writing has been presented to the Trustee of the discontinuance of such executive committee or the appointment of a new committee, the Trustee shall continue to act upon the authorization of any executive committee already appointed. All of the Buyers aforesaid shall jointly bind themselves to pay, as and when

due, in proportion to their respective beneficial interests hereunder as hereinabove set out, all sums of money necessary for the improvement of said property, and for taxes and for any and all other obligations provided for herein to be paid by the Buyers, and also any advancements made for their benefit by the Trustee or by the Seller, including the fees, [71] expenses and charges of the Trustee for acting hereunder, immediately and upon demand made upon them by the Trustee, together with interest aforesaid, if any accrued thereon, unless the equivalent thereof shall then be standing to their credit with the Trustee, realized from the sale of said property, which provision as to the liability of the Buyers under this paragraph shall extend to the payment of the unpaid principal of the purchase price of said property, together with interest aforesaid thereon and in the event that any one of said Buyers shall fail to pay his or her proportionate share of any such sums as and when the same shall become due and payable, or demand therefor shall be made by the Trustee, then the Trustee itself, or any other one or more of said Buyers hereunder shall have the right to advance and pay such share to the end that said property covered hereby, and the trust herein provided for, and all parties interested herein, may be protected; and any such sum or sums so advanced and paid for such defaulting Buyer shall bear interest from the date of such advancement until repaid at the rate of one (1) per cent per month, and in the event

of the exercising of such right above mentioned, the Trustee, on its own behalf or upon the written demand of the party or parties making such payment, and without any demand by the Trustee on such defaulting Buyer for the payment or reimbursement of such proportionate share, shall sell the interest of such defaulting Buyer under this Trust, which sale thereof shall be made by the Trustee in the following manner, namely:

The Trustee shall first publish notice of the time and place of such sale with a description of the interest so to be sold at least once a week for four successive weeks in some newspaper of general circulation published in the City of Los Angeles, California, and may from time to time postpone such sale by publication of such postponement in the same newspaper in one issue only, or at its option by public announcement of such postponement at the time and place of sale so advertised as aforesaid; and on the date of such sale so advertised or on the date to which such sale may be postponed, the [72] Trustee may sell said interest so advertised at public auction in said City of Los Angeles to the highest bidder for cash and any beneficiary hereunder or any other person may bid and purchase at such sale; and upon such sale the Trustee, after due payment made to it hereunder, may make and deliver to the purchaser at such sale an assignment and transfer of the interest so sold, and thereafter such purchaser shall have the same rights and privileges hereunder of the original

Buyer so defaulting as aforesaid, subject however, to all of the terms and conditions of this Trust; and each of said Buyers, for himself and itself, his and its successors and assigns, does hereby convey, assign and transfer to the Trustee any and all right and title whatsoever in and to his or its beneficial interest hereunder, to enable the Trustee to convey, assign and transfer such interest upon such sale thereof by the Trustee in the event of default as above provided.

Distribution of the proceeds arising from such sale by the Trustee shall be made and applied by the Trustee as follows:

1st. To the payment of the expenses of such sale, including the Trustee's fee of $100.00, which amount shall be in addition to the fees to it elsewhere herein provided; all to become and be due and payable upon action by the Trustee on its own behalf in such sale, or upon demand being made upon the Trustee for the sale by it of the interest of such defaulting Buyer as hereinabove provided.

2nd. To the person or persons having paid the same, the amount advanced and paid by him or them for such defaulting Buyer as hereinabove provided, with interest thereon aforesaid; and the remainder, if any, to the order of such defaulting Buyer. In the event of the sale of such interest aforesaid hereunder of any such defaulting Buyer, and execution by the Trustee of assignment and transfer thereof under this trust, then the recitals

therein as to default and publication of notice of sale, and demand that such sale be made, postponement of sale, amount and terms of sale, purchaser, payment of purchase money, or any other fact or facts affecting the regularity and [73] validity of such sale, shall be conclusive proof of all facts recited in such assignment and transfer, and any such assignment and transfer with such recitals therein shall be effectual and conclusive against such defaulting Buyer and all other persons as to all facts recited therein; and the receipt for the purchase money contained in any assignment and transfer executed by the Trustee to the purchaser at any such sale as aforesaid shall be sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase money.

ELEVENTH: Should a breach or default be made in payment of any of the sums secured hereby, or herein provided to be paid or repaid by the Buyers hereunder, or should they fail to perform any of their duties or obligations imposed upon them by the terms of this instrument, then the Trustee or the Sellers hereunder may declare all sums secured hereby immediately due and payable, and the Trustee is hereby authorized thereupon to sell the property aforesaid so held in trust in the manner hereinafter provided, and out of the proceeds realized from such sale, after paying the expenses thereof, including attorney's fees, to pay the amount of the unpaid remainder of said purchase

price of said property, together with the interest accrued and unpaid thereon, as hereinbefore mentioned, and secured hereby. Before making said sale the Trustee shall cause to be filed in the office of the County Recorder of Los Angeles County, California, a notice of such breach and default, and that the Seller elects to have the property described in this Declaration of Trust sold to satisfy the obligations secured hereunder, and three months after the filing of said notice, without demand on the Buyers or any of them, the Trustee may proceed to sell the property aforesaid or any portion thereof, for cash for the highest price which it is able to obtain, such sale being made in the following manner:

The Trustee shall first publish notice of the time and place of such sale with the description of said property so to be sold, [74] at least once each week for three successive weeks in some newspaper of general circulation printed in the City of Los Angeles, California, and notice of such sale shall be posted complying with the laws of California governing sales of real property under execution, and may from time to time postpone said sale by announcement at the time and place of sale fixed, or by re-publishing notice of sale in the same newspaper with the date of postponement attached thereto, in one issue only, prior to the date of the postponed sale, and on the date so announced or advertised, or any date to which such sale may be postponed, the Trustee may sell said property or

any portion thereof either en masse or in separate parcels, in its own discretion, at public auction, at which sale the Trustee or any party hereto may be a purchaser; and after such sale and payment made, the Trustee may execute and deliver a deed or deeds conveying the property so sold to the purchaser or purchasers thereof, but without covenant or warranty expressed or implied, whereupon such purchaser or purchasers shall be let into immediate possession of said property so sold, and all persons in possession thereof shall be deemed to be tenants at sufferance; and the recitals by the Trustee in any such deed or deeds of any or all facts or matters affecting the regularity or validity of any such sale shall be conclusive against all persons, including the Buyers and each of them and their successors in interest. Such sale, however, shall be made subject to any outstanding contracts theretofore made by the Trustee for the sale of respective lots aforesaid, but all moneys then remaining unpaid on said lots or any of them theretofore sold on contract shall become and be due and payable to the purchaser or purchasers of said lot or lots at such sale.

The Trustee, out of the proceeds of such sale shall pay:

(a) Expenses of said sale, including counsel fees and Trustee's fees herein provided for.

(b) All sums which have been paid or advanced under or in accordance with the provisions hereof, and not repaid, together with interest aforesaid accrued thereon. [75]

(c) The principal amount due and unpaid to the Seller herein, together with unpaid interest aforesaid accrued thereon.

(d) The remainder of such proceeds, if any, to the Buyers, their successors or assigns, according to their respective interests hereunder aforesaid.

TWELFTH: The Buyers shall pay to the Trustee the following fees and compensation for its acceptance of this Trust and for acting as Trustee hereunder:—

(a) An installation fee of Two Hundred ($200.00) Dollars payable upon the acceptance hereof.

(b) $5.00 for the preparation of each deed and $5.00 for the preparation of each contract in each case covering one lot or parcel only.

(c) Collection charges from the sale price of said parcels which shall be as follows:—

Two per cent (2%) of the sale price where the payments do not exceed three in number. Where the payments do exceed three in number the collection fees shall be three per cent (3%) of the sale price. Like fees shall be paid on all interest collected.

THIRTEENTH: The Trustee hereby agrees to act under the terms of this instrument only upon the following conditions:

That except for its willful default or gross negligence it shall not be liable to anyone; when in its discretion it acts upon the advice of legal counsel, selected and employed by it in good faith, in accord-

ance with the opinion of such counsel, it shall not be liable for any result of such action; should it be called upon to perform unlooked for or unanticipated duties in connection with this Trust not herein specifically provided for, then in addition to the fees above provided for it shall receive a reasonable compensation for the performance and discharge of such duties; all fees to the Trustee provided for hereunder shall be deemed to be earned upon the execution [76] hereof; the Trustee assumes no obligation and shall be under no obligation whatsoever to pay for or on account of any of the Buyers, or said trust property, or to or for the account of anyone whomsoever, any moneys other than and as herein specifically provided, except at its option so to do; this trust shall not cease or terminate unless and until the Trustee shall have been paid in full all sums herein provided to be paid to it.

IN WITNESS WHEREOF the said TITLE GUARANTEE AND TRUST COMPANY has caused this instrument to be duly executed by its officers thereunto duly authorized under its corporate seal this ..... day of December, 1922.

TITLE GUARANTEE AND TRUST COMPANY

By A. F. MORLAN

[Seal] Vice-President.

Attest: A. R. KILLGORE

Secretary. [77]

The above Declaration of Trust is hereby approved, ratified and confirmed by us and each of us as to all of its terms and provisions.

(Signed) JOHN W. MITCHELL
ADINA MITCHELL
Seller

We hereby certify that the above Declaration of Trust fully sets out all of the terms and provisions thereof and we hereby ratify, approve and confirm the same in all its parts, and hereby respectively agree to do and perform all and everything therein provided to be done by us respectively.

LOS ANGELES STONE COMPANY
By H. L. FERAUD 3/12
[Seal] President
Attest: GEO. H. CLARK
Secretary
F. E. BUNDY
C. L. BUNDY
R. P. SHERMAN 3/12
By H. L. FERAUD,
his attorney-in-fact
F. H. SIENER 2/12
Buyers.

Title Guarantee and Trust Company hereby certifies and declares that the foregoing is a full, true and correct copy of its Declaration of Trust #807.

TITLE GUARANTEE AND
TRUST COMPANY
By .....
Secretary. [78]

EXHIBIT "D"
DECLARATION OF TRUST
Trust #822 "B"—

THIS DECLARATION OF TRUST made and entered into this 1st day of April, 1924,

WITNESSETH:—

THAT WHEREAS, TITLE GUARANTEE AND TRUST COMPANY has heretofore issued its certain Declarations of Trust #750, #807 and #822 respectively, and

WHEREAS said Trusts were declared to be the property of JOHN W. MITCHELL, and for the purpose of securing an indebtedness of Sixty-eight Thousand ($68,000.00) Dollars in favor of L. C. BRAND, and to secure any additional moneys loaned or advanced by the said L. C. BRAND to the said JOHN W. MITCHELL, or for his benefit, or for the protection of the said Trusts or the said Trust property, and

WHEREAS the said L. C. BRAND has assigned the said note to the TITLE GUARANTEE AND TRUST COMPANY, and TITLE GUARANTEE AND TRUST COMPANY has, subsequent to the date hereof, loaned other sum or sums, and may from time to time hereafter loan other sum or sums to the said JOHN W. MITCHELL, and

WHEREAS it was the intention of JOHN W. MITCHELL and ADINA MITCHELL, his wife, that all of said properties should be held by them as joint tenants, with right of survivorship.

NOW THEREFORE THIS IS TO WITNESS that TITLE GUARANTEE AND TRUST COMPANY, at the request of JOHN W. MITCHELL and ADINA MITCHELL, his wife, declares that it holds the said Trusts and all assets thereof in Trust for JOHN W. MITCHELL and ADINA MITCHELL, his wife, as joint tenants, with right of survivorship, subject to all the terms of any assignment or assignments heretofore made to secure any indebtedness in favor of L. C. BRAND, with additional provisions [79] that the said Trusts shall also secure any indebtedness of the TITLE GUARANTEE AND TRUST COMPANY, and further, the parties hereto hereby assign to TITLE GUARANTEE AND TRUST COMPANY all notes in favor of JOHN W. MITCHELL given as part of the purchase price on the sale of properties covered by said Trusts, and in event of a default in the payment of any indebtedness in favor of L. C. BRAND, or TITLE GUARANTEE AND TRUST COMPANY, of any kind or nature, or for any purpose whatsoever, it is a provision hereof that the Trustee may sell the interests of JOHN W. MITCHELL and ADINA MITCHELL, his wife, in and to said Trusts or trust deeds as herein provided, and without the necessity of making demand on the said parties, or the survivor thereof, which said sale shall be in the following manner, namely:—

Said Trustee shall publish notice of the time and place of such sale, with a description of the interest in said Trust to be sold at least once a week for

four successive weeks in some newspaper published in the City of Los Angeles, California, and may from time to time postpone such sale by publication of a notice of postponement in the same newspaper at least once each week prior to the date of the sale fixed by said notice of postponement, or at its option, by public announcement thereof at the time and place of sale so advertised; and on the day of sale so fixed said Trustee may sell said interest or any portion thereof at public auction to the highest bidder for cash in gold coin, and after such sale and after due payment made, said Trustee shall execute and deliver to the purchaser or purchasers an assignment or assignments of the interest or interests in said Trust so sold to such purchaser or purchasers, subject to all of the terms and conditions thereof.

AND out of the proceeds of such sale or sales shall pay:

First: The costs, fees, charges and expenses of such sale.

Second: The amount due and unpaid on said note with [80] interest accrued thereon.

Third: Any additional sums, with interest accrued thereon, borrowed by said Assignors from said Payee, evidenced by another note or notes as hereinbefore provided.

And lastly, the balance, if any, to the order of the said Assignors.

In the event of a sale of said interest or any part thereof, and the execution of an assignment or assignments therefor, then the recitals therein of de-

fault, publication of notice of sale, demand that such sale should be made, postponement of sale, terms of sale, sale, purchaser, payment of purchase money and any other fact affecting the regularity or validity of such sale shall be conclusive proof of such facts.

Demand, presentment, notice, protest and notice of protest are hereby waived.

IN WITNESS WHEREOF we have hereunto set our hands and seals the day and year first above mentioned.

JOHN W. MITCHELL
ADINA MITCHELL

The above assignment is hereby approved in all its parts.

L. C. BRAND

Title Guarantee and Trust Company hereby accepts the above Assignment and agrees to be governed by all of the terms hereof.

TITLE GUARANTEE AND
TRUST COMPANY
BY A. R. KILLGORE
Secretary [81]

This is to certify that the foregoing is a true, perfect and complete copy of the Declaration of Trust on file in the office of the Title Guarantee and Trust Company.

TITLE GUARANTEE AND
TRUST COMPANY
By E. D. REIMUS
Vice-President [82]

## EXHIBIT "E"

Treasury Department
Internal Revenue Service
Form 706—Revised May, 1926

### RETURN FOR FEDERAL ESTATE TAX

(Not to be filled in by taxpayer)

Time to file return extended Collection District.....
Bureau File No..... by Commissioner to .....
By Collector to.....

Collector of Internal Revenue will stamp here date return filed.

Assessments

| Amount | List | Page | Line |
|---|---|---|---|
| | | | |
| | | | |

Payments

| Date | Principal | Interest |
|---|---|---|
| | | |
| | | |

Tentative findings, $..... Date..... By.....
Determined, $..... Date..... By.....
Redetermined, $..... Date..... By.....

| Assessments | | | | Payments | | | |
|---|---|---|---|---|---|---|---|
| Amount of deficiency, exclusive of interest | Interest on deficiency from due date of tax to date of assessment | List Page Line | Date | Amount of deficiency, exclusive of interest | Interest assessed on deficiency from due date to date of assessment | All other interest Adjustments | |
| | | | | | | | |
| | | | | | | | |

An itemized inventory by schedule of the gross estate of decedent, with legal deductions to be filed in duplicate.

Decedent's name John W. Mitchell Date of death July 2, 1925 Residence at time of death 1007 Ocean Boulevard, Coronado, California.

General Instructions—Read with care

1. The return is required for the estate of every resident decedent who died after the effective date of the Revenue Act of 1926 and the value of whose gross estate at the date of death exceeded $100,000, for the estate of every resident decedent who died prior to such date whose gross estate exceeded $50,000, and for the estate of every non-resident decedent any part of whose gross estate was at the date of death situated (within the meaning of the statute) in the United States. The term "United States" means only the States, Territories of Alaska and Hawaii, and the District of Columbia.

2. The return is due one year after the date of death. THE RETURN for a RESIDENT DECEDENT should be filed with the collector of the district in which such decedent was domiciled at the time of death. THE RETURN for a NONRESIDENT DECEDENT should be filed with the United States Collector of Internal Revenue of the district in which the gross estate was situated, or, if situated within more than one district, or if the gross estate consisted wholly of stock in a domestic corporation, then with the Collector of Internal Revenue for the Second New York District, New York, N. Y., or with such other collector as the Commissioner may designate.

3. Remittance in payment of the tax should be made payable to "Collector of Internal Revenue at .....," naming city in which the office of the collector with whom the return is filed is located.

4. Regulations 70, 1926 Edition, should be carefully studied before making out the return, and if the decedent died prior to 10.25 a.m., Washington, D. C., time, February 26, 1926, reference should be made to Article 110 of such regulations.

5. All papers used in preparing the return should be carefully preserved for reference or inspection. All estate tax returns are verified by an Internal Revenue officer before the tax is determined by the Bureau.

6. If the decedent was a resident and left a will, two copies thereof, one of them certified, must be filed with the return. In the case of the estate of a NONRESIDENT, there should be filed with the return—

(a) A certified copy of the will, if decedent died testate, or of each will, if decedent left more than one to govern in different jurisdictions.

(b) A certified copy of inventory of the complete gross estate, whether situated within or without the United States, if any deductions are claimed. In such case separate schedules should be made for property within and without the United States.

(c) A certified copy of schedule of debts and expenses allowed, if deduction thereof is

claimed. If certified copy of inventory of all property outside the United States is filed with the return, such property need not be entered under the respective schedules of the return. See article 52, Regulations 70, 1926 Edition.

7. This form consists of cover sheets, general information sheet, and fifteen schedules. Care should be taken to see that the return is complete and that all schedules are included in the proper order.

In the estate of a resident the various items comprising the gross estate must be set forth upon the schedules provided.

8. The questions asked under each schedule should be specifically answered, and if the decedent owned no property of any class specified under the schedule, the word "None" should be written across the schedule.

9. If there is not sufficient space for all entries under any schedule, use additional sheets of the same size, numbering them consecutively, as, for example, Schedule A-1, A-2, etc., and insert them in the proper order in the return.

10. Further instructions will be found under each schedule. If instructions are carefully observed, it will greatly assist the estate and the Bureau in the final determination of the tax liability.

11. PENALTIES.—For penalties for failure to file return when due, keep records, and supply in-

formation, or for the preparation or presentation or the aiding or assisting in the preparation or presentation of a false or fraudulent return, affidavit, claim, or document, see Sections 320, 1103, 1114 of the Revenue Act of 1926.

GENERAL INFORMATION SHEET

The information called for on this page is necessary for purposes of record and verification. Fill out all blanks carefully and completely.

The names of the decedent's legal heirs and next of kin, or if decedent left a will, the names of the beneficiaries thereunder, are required to be stated. If there are more than ten, only the names of the ten principal ones are required.

Did decedent die testate? (Answer "Yes" or "No.") Yes. If testate, two copies, one of them certified, of the last will must be filed with the return, unless the decedent was a nonresident, in which case but one copy, certified, is required.

Permanent residence at time of death: Coronado, California.

Actual place of death: Coronado, California.

Age at death: 63.

Cause of death:

How long ill:

Business or employment: Attorney-at-law—Retired.

Business address:

Was decedent married or single at date of death?: Married. Widow?: Widower?:

State number of children, if any: None.

## HEIRS, NEXT OF KIN, DEVISEES AND LEGATEES

| Name | Relationship | Address |
|---|---|---|
| Adina Mitchell | Wife | 1063 Ocean Blvd., Coronado, California. |

Names of decedent's physicians: Decedent was attended by a Christian Science Practitioner. Fred W. Decker.

Address: First Natl. Bk. Bldg., San Diego, Cal.

Names of physicians and nurses who attended decedent during last illness: Mrs. Jane M. Johnson.

Address: [84]

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Estate of John W. Mitchell District of California

## GROSS ESTATE
## SCHEDULE A
## REAL ESTATE

### Instructions

Article 12 of Regulations 70, 1926 Edition, should be read before preparing this schedule.

Real estate should be so described that it may be readily located. The legal description is not required unless necessary to show the exact location. The character of the buildings should be stated and the character and area of unimproved land. For location, such details as the following may be necessary:

City or Town Property.—Street and number, ward, subdivision, block and lot, etc.

Rural Property.—Township, range, block and lot, street, landmarks, etc.

If any item of real estate is subject to mortgage, the unpaid balance of the mortgage should be shown below under "Description." The full value of the property and not the equity must be extended in the value column. The mortgage should be deducted under Schedule J of this return.

The value of dower, curtesy, or a statutory estate created in lieu thereof, is taxable, and no reduction on account thereof should be made in returning the value of the real estate.

All rents accrued and unpaid should be apportioned to the date of death whether due at that time or not.

For further instructions see Articles 10 to 13, inclusive, Regulations No. 70, 1926 Edition.

Did the decedent, at the time of death, own any real estate? (Answer "Yes" or "No.") .....

| Item No. | Description | Assessed value for year of decedent's death | Fair market value at date of decedent's death | Rents accrued to date of death |
|---|---|---|---|---|
| | | $ | $ | $ |
| 1 | Lot 13, Block 13, Coronado Beach, South Island, as per map 869 in the office of the County Recorder of San Diego Co. | 8,000.00 | 30,000.00 | None |
| 2 | A portion of Lots 9, 10, 11, 12, 13, 14 and 15, Block 5, Coronado Beach, South Island, according to deed from N. Gardner et ux to John W Mitchell (Note: this parcel has been sold under order of court during probate of this estate.) | 3,105.00 | 6,000.00 | None |
| 3 | Lots 1, 2, 3, 4, 5, 22, 23, 24, 25, 26, 27 and 28, Block 13, Coronado Beach, South Island | 42,600.00 | 160,000.00 | None |
| 4 | NE ¼ of the SE ¼, S ½ of the SE ¼ of Sec. 1; W ½ of the NE ¼ and the W 352.7 feet of the N 201 feet of the NE ¼ of the NE ¼ of Sec. 12, all in Twp. 14 S., R 1 W, S.B.M., in the County of San Diego | 730.00 | 15,000.00 | None |
| 5 | A strip of land in the City of Santa Monica, Calif., 1718.61 feet in length and containing approximately 1.64 acres, as per detailed description attached | | 53,700.00 | None |
| | Totals | | $264,700.00 | $ |

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## SCHEDULE B.
## STOCKS AND BONDS.

### INSTRUCTIONS.

Give a complete description of all securities.

Stocks.—State the number of shares, common or preferred, par value, and quotation at which returned, exact title of corporation, and, if the stock is unlisted, the location of the principal business office. If a listed security, state principal exchange upon which sold.

Examples: 10 shares American Car & Foundry Co., preferred, par $100, at 98, New York Exchange. 10 shares Eagle Manufacturing Co., Red Bank, N. J., common, par $25, at 30, unlisted.

Bonds.—State quantity and denomination, *exact title,* kind of bond, interest rate, interest and due dates. State the exchange upon which listed or the principal business office of the company, if unlisted.

Example: Ten $1,000 Baltimore and Ohio Railway Co. first mortgage 4 per cent registered 50-year gold bonds, due 1948. January, April, July, and October, at 96, New York Exchange.

*Listed stocks and bonds* should be returned at the mean between the highest and lowest quoted selling price upon the date of death, or if there were no sales on day of death, then at the mean between the highest and lowest sales on the nearest date thereto, if within a reasonable period. If death occurred on a Sunday or holiday quotations of the nearest previous day should be used; if listed on

several exchanges, quotations of the principal exchange should be employed.

If actual sales are not available and the stock is quoted on a bid and asked basis, the bid as of date of death should be taken.

*Unlisted securities* which are dealt in actively by brokers or have an active market should be returned at the sale price as of the date of death or the nearest date thereto, if within a reasonable period either before or after death. Only sales in the normal course of business should be employed. Where no such sale occurred the nearest bid should be used, if within a reasonable period either before or after death.

*Inactive stock and stock in close corporations* should be valued upon the basis of the company's net worth, earning and dividend paying capacity, general market conditions, and special conditions affecting the particular company, its future prospects, [illegible] all other factors having a bearing upon the value of the stock. The financial and other data upon which the estate bases its [illegible] ation should be submitted with the return.

*Securities returned as of no value,* nominal value, or obsolete, should be listed last, and the address of the company and the State and date of incorporation should be stated. Correspondence or statements used as the basis for return at no value should be retained for inspection.

*Interest on bonds* should be apportioned to the date of death and returned in the interest column.

Dividends upon stock declared prior to death, and payable after date of death, must be returned separately in the interest column unless reflected in the price at which the stock is returned.

In estates of nonresidents there should be listed in this schedule all stocks and bonds physically in the United States at date of death (as to meaning of the term "United States" see paragraph numbered "1" on the first page of this form), and the actual depository on that date should be shown. In such estates there should also be listed in this schedule the stocks of all corporations and associations created or organized in the United States. The foregoing requirements of this paragraph should be complied with, even though an inventory of the entire gross estate wherever situated is filed with the return.

Paragraph 3 of Article 13, and Article 12, regulations No. 70, 1926 Edition, should be carefully reviewed before preparing this schedule.

Did the decedent, at the time of death, own any stocks or bonds? (Answer "Yes" or "No.") Yes

If a resident decedent owned any stocks or bonds at the date of his death, they should be entered on pages 5 and 6. If the decedent was a nonresident there should be entered on pages 5 and 6, such stocks and bonds subject to tax as above indicated.

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Estate of John W. Mitchell District of California

SCHEDULE B—Continued

INSTRUCTIONS

For detailed instructions regarding the method of valuing stocks and bonds, see the preceding page.

| Item No. | Description | Fair market value at date of death | Interest or dividends |
|---|---|---|---|
| | 51 shares of the Capital Stock of Central Investment Co. of Los Angeles | $4896.00 | $ |
| | 10 shares of the Capital Stock of First National Bank of Los Angeles | 3860.00 | |
| | | 8756.00 | |
| | Totals | $ | $ |
| | Grand Total | | $ |
| | Amounts Carried Forward | $ | $ |

(Continued on page 6)

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Estate of District of

SCHEDULE B—Continued

For Instructions see Page 4

| Item No. | Description | Fair market value at date of death | Interest or dividends |
|---|---|---|---|
| | Amounts brought forward | $ | $ |
| | Totals | $ | $ |
| | Grand Total | | $ |

(If more space is needed, insert additional sheets of same size)

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Estate of John W. Mitchell. District of California.

SCHEDULE C

Mortgages, Notes, Cash, and Insurance

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INSTRUCTIONS

Article 12 of Regulations 70, 1926 Edition, should be read before preparing this schedule.

The four classes of property on this schedule should be listed separately in the order given.

Mortgages.—State (1) face value and unpaid balance, (2) date of mortgage, (3) name of maker, (4) property mortgaged, (5) interest dates and rate of interest, and (6) amount of unpaid interest. For example: Bond and mortgage for $5,000, unpaid balance $4,000; dated January 1, 1923, John Doe to Richard Roe; premises 22 Clinton St., Newark, N. J.; interest payable at 6 per cent per annum January 1 and July 1; interest paid to January 1, 1924; unpaid interest $30.

Notes, Promissory.—Give similar data.

Cash in Possession.—List separately from bank deposits.

Cash in Bank.—Name bank and address, amount in each bank, serial number and nature of account, stating whether checking, savings, time deposit, etc. Include accrued interest in income column, or indicate if included in total on deposit. If statements are obtained from banks they should be retained for inspection by an internal-revenue agent.

Insurance.—The proceeds of all life insurance to whomsoever payable must be returned regardless of

value. Insurance payable to the estate must be returned first. State (1) name of company, (2) number of policy, (3) name of beneficiary. Include full amount receivable.

Important.—If there is insurance payable to beneficiaries other than the estate, deduction may be taken at bottom of this page equal to the amount returned for such insurance, but not exceeding $40,000.

If decedent was a nonresident, and died subsequent to 3.55 p. m. November 23, 1921, Washington, D. C., time, insurance on his life need not be included as a part of his gross estate. Neither should bank accounts situated in this country be included where the nonresident decedent died subsequent to said date unless decedent was doing business in the United States. All [illegible] concerning such an account should be reported where it is contended that the account is not taxable.

For further instructions see articles 25 to 28, inclusive, Regulations No. 70, 1926 Edition.

(1) Did the decedent, at the time of his death, own any mortgages, notes, or cash? (Answer "Yes" or "No.") Yes.

(2) Was any insurance on life of decedent receivable by his estate? (Answer "Yes" or "No.") No.

(3) Was any insurance on life of decedent receivable by beneficiaries other than the estate? Answer "Yes" or "No.") No.

| Item No. | Description | Fair market value at date of death | Income or interest accrued to date of death |
|---|---|---|---|
| | Cash in possession Title Guarantee and Trust Co. of Los Angeles, as trustee. | $ 81,148.75 | $ |
| | A note of F. A. Hartwell secured by a deed of trust of certain real property, which is of record in the office of the County Recorder of Los Angeles County, on which there was unpaid at the date of death, (interest included) | 77,767.50 | |
| | A note of F. A. Hartwell secured by a deed of trust of certain real property, which is of record in the office of the County Recorder of Los Angeles County, on which there was unpaid at the date of death, (interest included) | 289,434.50 | |
| | A note of Los Angeles Stone Co., et al, secured by a deed of trust of certain real property, which is of record in the office of the Co. Recorder L. A. Co. | 43,609.67 | |
| | Total | $491,960.42 | |
| | Less amount of insurance receivable by beneficiaries, other than the estate, not in excess of $40,000 | $ | |
| | Totals | $ | $ |
| | Grand Total | 491,960.42 | $ |

(If more space is needed, insert additional sheet of same size

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Estate of..... District of.....

## SCHEDULE D-1
### Jointly Owned Property

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### INSTRUCTIONS

Article 12 of Regulations 70, 1926 Edition, should be read before preparing this schedule.

All property of whatever kind or character, whether real estate, personal property, bank accounts, etc., in which the decedent held at the time of his death an interest either as a joint tenant or as a tenant by the entirety, must be returned under this schedule.

The full value of the property must be included in the fourth column, unless it can be shown that a part of the property originally belonged to the other tenant or tenants and was never received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth. (See section 302 (e) of act approved Feb. 26, 1926, and articles 22 and 23, Regulations No. 70, 1926 Edition.)

Where it is shown that the property or any part thereof, or any part of the consideration with which the property was purchased, was acquired by the other tenant or tenants from the decedent for less than an adequate and full consideration in money or money's worth, there should be omitted from this schedule only so much of the value of the property as is proportionate to the consideration furnished by such other tenant or tenants.

Where the property was acquired by gift, bequest, devise, or inheritance by the decedent and spouse as tenants by the entirety, then only one-half of the value of the property should be listed on this schedule. Where the property was acquired by the decedent and another person or persons by gift, bequest, devise, or inheritance as joint tenants, and their interests are not otherwise specified or fixed by law, then there should be entered on this schedule only such fractional part of the value of the property as is obtained by dividing the full value of the property by the number of joint tenants.

If the executor contends that less than the value of the entire property is includable in the gross estate for purposes of the tax, the burden is upon him to show his right to include such lesser value, and in such case he should make proof of the extent, origin, and nature of the decedent's interest and the interest of decedent's cotenant or cotenants.

If the property consist of real estate, the assessed value thereof for the year of death should be shown in the second column, headed "Description of property." In the third column should be entered the fair market value of the whole property, even though only a fractional part thereof is returnable in column 4. In the fourth column should be entered the amount to be included in the gross estate pursuant to the instructions given above. In the fifth column should be entered the rents, interest, and other income accrued to the date of decedent's death in the

same proportion as the amount entered in column 4 bears to the amount entered in column 3.

Property in which the decedent held an interest as a tenant in common should not be listed here, but the value of his interest therein should be returned under Schedule A, if real estate, or if personal property, under the appropriate schedule. The value of the decedent's interest in partnerships should not be included here, but under Schedule D-2, on the following page, designated as "Other Miscellaneous Property."

| Item No. | Description of property | Fair market value of the property at date of decedent's death | Amount to be included in gross estate | Rents and other income accrued to date of death |
|---|---|---|---|---|
| | Joint account of deceased and Adina Mitchell, as joint tenants with the right of survivorship, in the First National Bank of San Diego, | $5,612.95 | $ | $ |
| | Totals | | $ | $ |
| | Grand Total | | | $ |

(If more space is needed, insert additional sheets of same size)

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Estate of John W. Mitchell. District of California.

## SCHEDULE D-2

### Other Miscellaneous Property

### INSTRUCTIONS

Article 12 of Regulations 70, 1926 Edition, should be read before preparing this schedule.

Under this schedule include all items of gross estate not returned under another schedule, includ-

ing the following: Debts due the decedent; interests in business; claims, rights, royalties, pensions; leaseholds, judgments, shares in trust funds or in estates of decedents who died more than five years prior to the present decedent's death, or in estates of decedents who died within five years prior to the present decedent's death where the share therein is not reported on schedule G, or on another schedule of this return; household goods and personal effects, including wearing apparel; farm products and growing crops; livestock, farm machinery, automobiles, etc.

When an interest in a copartnership or unincorporated business is returned, submit in duplicate statement of assets and liabilities as of date of death and for the five years preceding death, and statement of the net earnings for the same five years. Good will must be accounted for. In general, the same information should be furnished and the same methods followed as in valuing close corporations.

In listing automobiles give make, model, year, and condition as of date of decedent's death.

Did the decedent, at the time of his death, own any interest in a copartnership or unincorporated business? (Answer "Yes" or "No.") No.

Did the decedent, at the time of his death, own any miscellaneous property not returnable under any other schedule? (Answer "Yes" or "No.") Yes.

| Item No. | Description | Fair market value at date of death | Interest and other income accrued to date of death |
|---|---|---|---|
| | Paintings, as appraised by E. H. Furman per affidavit attached hereto, | $112,570.00 | $ |
| | Statuary, | 2,500.00 | |
| | Miscellaneous furniture, library and piano in art gallery, | 5,000.00 | |
| | Pierce-Arrow Enclosed Drive Limousine, 1923 Model | 3,500.00 | |
| | Chrysler Brougham, 1924 Model | 1,000.00 | |
| | Regular membership in Hollywood Country Club | 250.00 | |
| | Regular membership in Los Angeles Tennis Club, | 100.00 | |
| | Totals | $124,920.00 | $ |
| | Grand Total | | $ |

(If more space is needed, insert additional sheets of same size)

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Estate of..... District of.....

## SCHEDULE E

### Transfers

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### INSTRUCTIONS

Article 12 of Regulations 70, 1926 Edition, should be read before preparing this schedule.

All gifts or transfers, by trusts or otherwise, made or created by the decedent, regardless of the date thereof, in contemplation of, or intended to take effect in possession or employment at or after death, other tha nas bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax and must be returned under this

schedule and the value of the property entered in the fourth column.

Transfers made by the decedent in his lifetime, other than as bona fide sales for an adequate and session or enjoyment at or after death, excepting bona fide sales for an adequate and full consideration in money or money's worth, must be returned for tax or disclosed in the return as follows:

1. TRANSFERS MADE IN CONTEMPLATION OF DEATH.—The executor must return for tax the value as of the date of decedent's death of all property transferred by the decedent at any time in contemplation of death.
2. TRANSFERS NOT ADMITTED TO HAVE BEEN MADE IN CONTEMPLATION OF DEATH.—(a) the executor is required to disclose in the return all transfers made at any time by the decedent of an amount or value of $5,000 or more. Any such transfer made within two years of decedent's death, but before the effective date of the Revenue Act of 1926, and constituting a material part of decedent's property and in the nature of a final disposition or distribution thereof, is deemed to have been made in contemplation of death within the meaning of the statute. Where the executor contends that the transfer was not made in contemplation of death, he must file with the return sworn statements in duplicate of all the material facts including, among other things,

the decedent's motive in making the transfers, his mental and physical condition at that time, and one copy of the death certificate. (b) The executor is required to return for tax all transfers made by the decedent within two years prior to his death but after the effective date of the Revenue Act of 1926, to the extent that the value thereof to any one person is in excess of $5,000 even though the transfer is not admitted to have been made in contemplation of death. The entire value of the transfer should be disclosed in the return.

All property transferred, by the decedent during his lifetime, except bona fide sales for an adequate and full consideration in money or money's worth, constitutes a part of the gross estate if at the time of the decedent's death the enjoyment thereof was subject to any change through the exercise of a power to alter, amend or revoke, either by the decedent alone or in conjunction with any person. Where property was so transferred and the decedent, in contemplation of death, relinquished the power to alter, amend, or revoke the transfer, the transfer is subject to tax, and the value of the property must be included in columns 3 and 4 of this schedule.

Where the transfer was effected by an instrument in writing, two copies of such instrument should be filed with the return, one copy of which must be certified or verified, unless the decedent was a non-

resident, in which case but one copy, certified or verified, need be filed.

[Illegible] of transferee, date and form of transfer, description of property, and fair market value at time of death should be set forth in this schedule. For further [illegible] see articles 15 to 21, inclusive, Regulations No. 70, 1926 Edition.

[Illegible] the decedent, at any time during his life, make any transfer in contemplation of or intended to take effect in possession or enjoyment or after his death, other than by bona fide sale for an adequate and full consideration in money or money's worth? (Answer "Yes" or "No.") No.

(2) Did the decedent, within two years immediately preceding his death, make any transfer of a material part of his property without an adequate and full consideration in money or money's worth? (Answer "Yes" or "No.") No.

(3) Did the decedent, within two years immediately preceding his death, make any transfer of an amount or value equal to or exceeding $5,000 without an adequate and full consideration in money or money's worth? (Answer "Yes" or "No.") No.

(4) Did the decedent, at any time, make a transfer of a material part of his property without an adequate and full consideration in money or money's worth, but not believed to have been in contemplation of death or intended to take effect

in possession or enjoyment at or after his death? (Answer "Yes" or "No.") No.

(5) If the answer to question (4) is "Yes," state date, amount or value, and motive which actuated the decedent in making the transfer or transfers:

.....

.....

.....

.....

.....

[Illegible] the decedent, at the time of his death, possess the right (either alone or in conjunction with any person), to change [illegible] through the exercise of a power to alter, amend, or revoke the transfer of any property previously made by him? (Answer "Yes" or "No.") No.

[Illegible] Did the decedent, at any time during his life, relinquish in contemplation of his death the power to alter, amend, or revoke any transfer previously made by him? (Answer "Yes" or "No.") No.

(8) If the answer to either question (6) or (7), or both of them, is "Yes," the value of the property transferred must be entered in column 4 for inclusion in the gross estate.

(9) Were there in existence at the time of the decedent's death any trusts created by him during his lifetime? (Answer "Yes" or "No.") Yes.

| Item No. | Description of property transferred, and details of transfer | Fair market value at date of death | Fair market value to be included in gross estate | Rents or other income accrued to date of death |
|---|---|---|---|---|
| | | $ | $ | $ |
| | Further answering question No. 9, the decedent in his lifetime created trusts with the Title Guarantee and Trust Co., of Los Angeles as trustee, being trusts Nos. 750, 807 and 822, for the purpose of subdividing, selling and managing certain real property and collecting the sale price thereof, but all such property included in said trusts has been reported herein. | | | |

Totals ..... $..... $.....

Grand Total ..... $.....

Amounts Carried Forward..... $..... $.....

(Continued on following page)

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Estate of..... District of.....

SCHEDULE E—Continued

For Instructions—See Page 10

| Item No. | Description of property transferred and details of transfer | Fair market value at date of death | Fair market value to be inoluded in gross estate | Rents and other income accrued to date of death |
|---|---|---|---|---|
| | Amounts brought forward..... | $ | $ | $ |
| | Totals ..... | | $..... | $..... |
| | Grand Total ..... | | | $..... |

(If more space is needed, insert additional sheets of same size)

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Estate of..... District of.....

## SCHEDULE F

### Powers of Appointment

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### INSTRUCTIONS

Article 12 of Regulations 70, 1926 Edition, should be read before preparing this schedule.

Property passing under a general power of appointment exercised in the decedent's will must be returned. If the decedent exercised a general power by deed, the value of the property must be included in the gross estate if the deed was made in contemplation of death or intended to take effect in possession or enjoyment at or after death, except where executed for an adequate and full consideration in money or money's worth.

Duplicate copies of the will or deed conferring the power upon the decedent, and of the instrument by which the power was exercised, must be filed with the return, and one copy of such will, deed and instrument must be duly certified or verified, unless the decedent was a nonresident, in which case but one copy of each of the documents referred to, certified or verified, need be filed. This should be done even though it is contended that the power was a limited one and the property passing thereunder is not returned as taxable.

Property passing under the exercise of a power of appointment should not be listed under any other schedule.

For further instructions see Article 24, Regulation No. 70, 1926 Edition.

(1) Did the decedent, at any time, by will or otherwise, transfer property by the exercise of a general power of appointment? (Answer "Yes" or "No.") No.

(2) Did the decedent, at any time, by will or otherwise, exercise a limited power of appointment? (Answer "Yes" or "No.") No.

| Item No. | Description and details | Fair market value at date of death | Rents and other income accrued to date of death |
|---|---|---|---|
| | | $ | $ |
| | Totals | $ | $ |
| | Grand Total | | $ |

(If more space is needed, insert additional sheets of same size)

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Estate of..... District of.....

SCHEDULE G

Property Identified as Previously Taxed

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INSTRUCTIONS

Before executing this schedule read carefully articles 41 to 43, inclusive, and 53, Regulations 70, 1926 Edition.

Property identified as received from a donor or a prior decedent within five years prior to the present decedent's death or acquired in exchange for such property, must be included in this schedule at the value at the date of the present decedent's death whether greater or less than the value as included in the donor's gift tax return, or in the return for the prior decedent, and deduction taken

under Schedule K. The deduction is limited to the identical property received or property identified as acquired by first exchange of such property. No deduction is permitted for property acquired by a second or subsequent exchange.

Where property identified as acquired by first exchange is returned, it must be listed in such manner as to indicate that fact and to show the original property received from the donor or the prior decedent.

If property is acquired by exchange, the full value thereof at the date of the present decedent's death must be entered in this schdule and carried forward to the recapitulation of the gross estate, even though the present decedent gave additional valuable consideration over and above the value of the property given in the exchange.

Unless property can be clearly identified and the full tax due from the donor or prior estate has been paid, the deduction can not be taken. The burden of proof rests upon the person claiming the deduction.

Where properties listed on this schedule were received from more than one donor or prior decedent, set out separately the property received from each, and give with respect to each donor or prior decedent the information called for immediately below.

Donor or Prior Decedent

Name of donor or prior decedent.....

(Strike out words not applicable)

If a decedent, show date of death, or if a donor, show calendar year in which gift to this decedent was made .....

Residence of donor at time of gift, or of decedent at time of death .....

Name and address of administrator or executor of prior decedent .....

Return was filed with Collector at.....

| Item No. | Description | Fair market value at date of present decedent's death | Rents and other income accrued to date of present decedent's death |
|---|---|---|---|
| | | $ | $ |
| | Totals ..... | $..... | $..... |
| | Grand Total to be Included in the Gross Estate..... | | $..... |

(If more space is needed, insert additional sheets of same size)

[95]

SCHEDULE H—EXPENSES OF ADMINISTRATION—Continued.

| | | |
|---|---|---|
| Amount brought forward, | | $28,467.27 |
| Insurance premiums on policies covering property of the estate, | | 1,320.50 |
| Interest paid on notes and mortgages of the deceased during the administration of the estate to date: | | |
| Southern Trust & Commerce Bank (Daniels Mtg.) | $1,030.00 | |
| Prudential Bond and Mtg. Co. (Mtg. & Tr. Deed) | 569.10 | |
| First Nat. Bank of San Diego (Unsecured notes) | 2,368.94 | 3,968.04 |
| Care and maintenance of property at 1007 Ocean Blvd., Coronado, (Parcel 1, Schedule A) to July 1, 1926 | | 1,546.54 |
| Care and maintenance of Bradley Springs Ranch, (Parcel 4, Schedule A) to July 1, 1926, | | 2,156.82 |
| | | $37,459.17 |

Note: This estate will not be closed before two years from the date of death of the deceased, (July 2, 1925) on account of pending collections necessary to pay debts, and other pending matters, and the time required to close it may even be longer than this estimate. It is, therefore, impossible to give the expenses of administration which may be

allowed the Executrix on final settlement of her accounts, at this time. The Executrix therefore reserves the right to include further expenses as they accrue, to be reported in an amended and supplemental return, and to be accounted for in the final settlement of the tax due in this estate. [96]

Estate of John W. Mitchell, District of California.

DEDUCTIONS

SCHEDULE H

Funeral and Administration Expenses

---

INSTRUCTIONS

Funeral expenses and administration expenses should be itemized, giving names and addresses of persons to whom payable, and exact nature of the particular expense. Preserve all vouchers and receipts for inspection by an internal revenue agent.

No deduction may be taken upon the basis of a vague or uncertain estimate.

Executors' or administrators' commissions should be entered in such amount as has actually been paid, or which it is reasonably expected will be paid, not to exceed the amount allowable by the laws of the jurisdiction wherein the estate is administered, and not in excess of the amount usually allowed in cases similar to that of this estate. Where the commissions have not been awarded by the court, their deduction on final audit is discretionary with the Commissioner, subject to future adjustment.

Attorneys' fees should be deducted in the amount paid, or to be paid. If the fees have not been paid at the time of the [illegible], their deduction is discretionary with the Commissioner, subject to future adjustment.

Estate, legacy, succession, and inheritance taxes, and taxes on income received after death, are not deductible. Credit to a limited extent may be taken for estate, legacy, succession, inheritance and gift taxes, provided the conditions named in article [illegible] Regulations 70, 1926 Edition, are fully met.

For further instructions see Articles 9, 29 to 35, inclusive, and 52, Regulations No. 70, 1926 Edition.

| Item No. | | Amount of item | Totals |
|---|---|---|---|
| | Funeral expenses: | | |
| | Johnson-Saum Co., undertakers, San Diego | $755.30 | $ |
| | Pierce Bros Co., undertakers, Los Angeles | 72.70 | |
| | Rosedale Cemetery Association, | 12.50 | |
| | Reader at Funeral services, | 10.00 | |
| | Soloist at funeral services, | 10.00 | |
| | Total Funeral Expenses | 860.50 | $ 860.50 |
| | Executor's commission, estimated, xxx (Strike out words not applicable) | $11500.00 | |
| | Attorney's fee, estimated, xxx (Strike out words not applicable) | $11500.00 | |
| | Miscellaneous administration expenses: | | |
| | Publication notice to creditors | 6.00 | |
| | Clerk's filing and miscellaneous fees, | 9.00 | |
| | Publication notice of probate of will, | 6.00 | |
| | Publication notice of sale real estate | 22.75 | |
| | Appraisers: Frank Smith | 25.00 | |
| | Charles Eaton, | 150.00 | |
| | John Burnham, | 150.00 | |
| | Edwin N. Goodwin, | 218.00 | |
| | Clerk's fees on sale real estate, | 1.80 | |
| | Commission paid Mark Vilim on sale real est. | 300.00 | |
| | Title charges, taxes, etc., to pass title on sale | 120.79 | |
| | Taxes, County of San Diego | 2582.04 | |
| | Taxes, City of Coronado | 1875.89 | |
| | Total Administration Expenses | | $ |
| | Grand Total Forward to next page | $ 28467.27 | $ |

(If more space is needed, insert additional sheets of same size)

[97]

Estate of John W. Mitchell. District of California

SCHEDULE I

Debts of Decedent

INSTRUCTIONS

Itemize fully below all valid debts of the decedent owing by him at the time of death.

If deduction is claimed for a debt, the amount of which is disputed or the subject of litigation, only such amount may be deducted as the estate concedes to be a valid claim. If the claim is contested, that fact should be stated.

Enter in this schedule notes unsecured by mortgage and give full details, including name of payee, face and unpaid balance, date and term of note, interest rate and date to which interest was paid prior to death.

Care must be taken to state the exact nature of the claim as well as the name of the creditor. If the claim is for services rendered over a period of time, state the period covered by the claim. Example: Edison Electric Illuminating Company for electric service during December, 1923, $25.

All Vouchers or Original Records should be preserved for inspection by an internal revenue agent.

For further instructions see Articles 29, 30, 36, 37, and 52, Regulations No. 70, 1926 Edition.

| Item No. | Creditor and nature of claim | Amount |
|---|---|---|
| | The following claims have been allowed by the Superior Court of the County of San Diego, in proceedings for the administration of said estate: | |
| | First National Bank of San Diego, including interest to date of death of decedent, | $ 50,548.18 |
| | Earl L. Standahl, | 1,490.00 |
| | Seol and Chapman, | 176.80 |
| | MacGruer and Simpson, | 70,000.00 |
| | Curtis Studio, | 200.00 |
| | Gardner-Payne Co., | 788.00 |
| | Kirk, Roche Co., | 236.13 |
| | Louis J. Gill, | 1,230.00 |
| | Francisco Cornejo, | 100.00 |
| | Kirk and Kelly | 115.81 |
| | A. McArthur, | 142.32 |
| | Southern Electric Co., | 436.95 |
| | Cannell and Chaffin, | 10,519.83 |
| | Fred Wieland, | 160.00 |
| | Hersom and Clark, | 250.00 |
| | Title Guarantee and Trust Co., including interest to date of death of decedent, | 65,568.75 |
| | Adina Mitchell, | 971.84 |
| | | 202,934.61 |
| | Total | $ |

(If more space is needed, insert additional sheets of same size)

Estate of.....District of.....

## SCHEDULE J

Mortgages, Net Losses, and Support of Dependents

### INSTRUCTIONS

Mortgages.—Give location of property, name of mortgagee, date and term of mortgage, face amount, unpaid balance, rate of interest, date to which interest was paid prior to death. Identify by item number, as listed in Schedule A, the property securing each mortgage. Enter in fourth column accrued interest accrued to date of death. Mortgages upon, or any indebtedness in respect to, property included in the gross estate is deductible only to the extent that the liability for the mortgage or indebtedness was incurred or contracted bona fide and for an adequate and full consideration in money or money's worth. Unsecured notes should be listed on Schedule I.

Losses.—Losses are strictly limited to those arising from fire, storm, shipwreck, or other casualty, or from theft, to the extent that such losses are not compensated for by insurance or otherwise. Losses must occur during the settlement of the estate. Depreciation in the value of securities or other property does not constitute a deductible loss. In listing losses, full particulars must be given not only as to the loss sustained, but the cause thereof, and in the case of death of livestock, the cause of death must be stated, if known. If insurance or other

compensation was received on account of loss, state the amount collected.

Support of Dependents.—No deduction may be taken for support of dependents unless the local law permits the allowance, the local court has made a decree specifying the amount thereof, and in fact the allowance was reasonably required for the support of the person in question during the settlement of the estate, and actual disbursement was made from the assets of the estate to the dependents.

For further instructions see Articles 38, 39, 40, and 52, Regulations No. 70, 1926 Edition.

| Item No. | Mortgage | Unpaid amount at date of decedent's death | Interest accrued to date of death |
|---|---|---|---|
| | A mortgage made by deceased to Prudential Bond & Mtg. Co. covering Item 1, Schedule A, of record in the office of the County Recorder of San Diego | 10,000. ) | |
| | Deed of tr. same parties as above, same property | 2,000. ) | 236.54 |
| | A mortg. made to Annie R Daniels, covering Item 3 Schedule A of record Bk. 377 Mtgs., pg. 248, Rec. San Diego Co., So. Tr. & Com. Bk. Assgnee | 40,000. | 920.00 |
| | Totals | $52,000. | $ 1156.54 |
| | Grand Total | | $53156.54 |

(If more space is needed, insert additional sheets of same size)

| Losses during administration | Amount |
|---|---|
| | $ |
| None have been sustained as yet, but the administration of this estate has not yet been concluded and the executrix reserves the right to set up any losses which may hereafter accrue in an amended return when said administration is concluded. | |
| Total | $ |

| Item No. | Support of dependents | Amount |
|---|---|---|
| | | $ |
| | Family allowance granted to Adina Mitchell by the Sup. Court of the Co. of San Diego, in the Matter of the Est. of said deceased, by order dated Aug. 3, 1925, at the rate of $2,000. per mo. from the date of death of said deceased; credit claimed at this time for two years, as the estate will not be closed prior to that time, and executrix reserves the right to claim further credit in the event that the estate is not closed within the two years estimated. | |
| | Total | $ 48,000.00 |

(If more space is needed, insert additional sheets of same size)

[98]

Estate of..... District of.....

## SCHEDULE K-1
## Deduction of Property Identified as Previously Taxed

(See Schedule K-2 for Deduction of Charitable, Public, and Similar Gifts and Bequests)

### INSTRUCTIONS

Enter in this schedule the amount deductible as representing property received from a donor within five years next preceding the present decedent's

death, or from a prior decedent who died within five years of the death of the present decedent, or property acquired in exchange for property so received. If property received from more than one donor or prior decedent is listed in this schedule, that received from each should be set out separately.

Where the present decedent exchanged property which had been so received by him, and additional valuable consideration was given by him in such exchange, there may be deducted in this schedule such proportion only of the value, at the date of his death, of the property so acquired by the present decedent in such exchange as the value of the property received by him from such donor or prior decedent, and parted with by him in the exchange, bore to the entire consideration given. For example: An item of property received from a donor or a prior decedent, which had a value of $10,000, was exchanged for property valued at $15,000, and an additional $5,000 consideration was given by the present decedent. The full value at date of the present decedent's death of the property acquired in exchange should be listed under Schedule G and two-thirds of such value [illegible] under this schedule. The $10,000 and $15,000 values referred to in this example relate to the values as of the date of [illegible] exchange.

The amount deductible in this schedule may not exceed either (1) the value of the property received by the present decedent from a donor or prior de-

cedent, as that value was fixed by the Commissioner in determining the gift tax of such donor or the estate tax of the estate of such prior decedent, or (2) the fair market value of such property at date of present decedent's death.

Where any property received by the present decedent from a donor or prior decedent, or property acquired in exchange therefor, is used in the discharge of funeral or administration expenses, debts of the decedent, mortgages, support of dependents, or any bequest or devise for a public or charitable purpose, or is lost during the settlement of the present decedent's estate as the result of fire, storm, shipwreck, other casualty, or by theft, and deduction on account thereof is taken in Schedules H, I, J, and K-2, the deduction in this schedule must be correspondingly reduced.

For further instructions, see Articles 41, 42, 43, and 53 of Regulations No. 70, 1926 Edition.

| Item No. | Description of property | Amount previously taxed | Amount to be deducted |
|---|---|---|---|
| | | $ | $ |
| | Totals | | $ |

(If more space is needed, insert additional sheets of same size)

[99]

Estate of ..... District of.....

## SCHEDULE K-2

Charitable, Public, and Similar Gifts and Bequests

### INSTRUCTIONS

When a deduction is claimed under this schedule, there must be submitted with the return: (1) Two copies of the will, one of which should be certified, or two copies of the instrument of gift, one of which should be certified or verified. Where decedent was a nonresident, but one copy of the document, certified or verified, need be furnished; (2) an affidavit of the executor showing whether the decedent's will has been, or to the best of his knowledge, information and belief will be, contested.

For further instructions see Articles 44 to 47, inclusive, and 54, Regulations No. 70, 1926 Edition.

| Item No. | Name and address of beneficiary | Character of institution | Amount |
|---|---|---|---|
| | | | $ |
| | Total ..... | | $..... |

(If more space is needed, insert additional sheets of same size)

[100]

## SCHEDULE L

Recapitulation

| Schedule | Gross estate | Value |
|---|---|---|
| A | Real estate ..... | $264,700.00 |
| B | Stocks and bonds (grand total of all pages of this schedule)..... | 8,756.00 |
| C | Mortgages, notes, cash, and insurance | 491,960.42 |
| D-1 | Jointly owned property..... | 5,612.95 |
| D-2 | Other miscellaneous property..... | 124,920.00 |

| | | |
|---|---|---|
| E | Transfers | |
| F | Powers of appointment | |
| G | Property identified as previously taxed | |
| | Total Gross Estate | $895,949.37 |
| | One-half of above | 447,947.69 |

| Schedule | Deductions | Amount |
|---|---|---|
| H | Funeral expenses | $ 860.50 |
| | Administration expenses: | |
| | Executors' commissions | 11,500.00 |
| | Attorneys' fees | 11,500.00 |
| | Miscellaneous | 14,459.17 |
| I | Debts of decedent | 202,934.61 |
| J | Unpaid mortgages | 53,156.54 |
| | Net losses during administration | |
| | Support of dependents | 48,000.00 |
| K-1 | Property identified as previously taxed | 342,409.82 |
| K-2 | Charitable, public, and similar gifts and bequests | |
| | Specific exemption (resident decedents only) * | |
| | Total Deductions | $392,409.82 |

| | |
|---|---|
| Total gross estate | $895,949.37 |
| Total deductions | 392,409.82 |
| Net Estate for Tax | $503,439.55 |

*If decedent died prior to 10:25 a. m., Washington, D. C., time, February 26, 1926, insert $50,000; if decedent died subsequent thereto insert $100,000.

251,719.78

## SCHEDULE M

### Deductions—Estate of Nonresident

If the decedent was not a resident of the United States, Hawaii, or Alaska, no deductions whatever are allowable unless the value of that part of his gross estate situated outside of the United States, Hawaii, or Alaska be set forth. If it be desired to claim deductions, execute Schedules H-I-J-K and compute the deductions allowable as follows:

1. Value of gross estate in United States $..... (Schedules A-B-C-D-E-F-G) .....
2. Value of gross estate outside of the United States (attach itemized schedule showing values) ..... .....
3. Value of total gross estate wherever situated (1 plus 2)..... .....
4. Gross deductions under Schedules H-I-J .....
5. Net deductions under Schedules H-I-J (that proportion of 4 that 1 bears to 3, not exceeding 10% of 1)..... .....
6. Schedule K (within the United States) .....
7. Total deductions allowable (5 plus 6)..... .....
8. Net estate taxable (1 minus 7)..... .....

Executrix claims that she is entitled under the laws of the State of California to one-half of the community property of the decedent without the payment of tax, and this report is made upon that basis. [101]

DATE OF DEATH.....

| NET ESTATE | | | (1)* Sept. 9, 1916, to Mar. 2, 1917, inclusive | (2)* Mar. 3, 1917, to Oct. 3, 1917, inclusive | (3)* Oct. 4, 1917, to Feb. 24, 1919, inclusive | (4)* Feb. 25, 1919, to Feb. 26, 1926, inclusive | (5)* On and after Feb. 26, 1926 | AMOUNT OF TAX |
|---|---|---|---|---|---|---|---|---|
| Exceeding— | Not exceeding— | Amount of block | Rate per cent | Rate per cent | Rate per cent | Rate per cent | Rate per cent | |
| | $50,000 | $50,000 | 1 | 1½ | 2 | 1 | 1 | $ 500.00 |
| $50,000 | 100,000 | 50,000 | 2 | 3 | 4 | 2 | 2 | 1000.00 |
| 100,000 | 150,000 | 50,000 | 2 | 3 | 4 | 2 | 3 | 1500.00 |
| 150,000 | 200,000 | 50,000 | 3 | 4½ | 6 | 3 | 3 | 4000.00 |
| 200,000 | 250,000 | 50,000 | 3 | 4½ | 6 | 3 | 4 | 103.18 |
| 250,000 | 400,000 | 150,000 | 4 | 6 | 8 | 4 | 4 | ..... |
| [Illegible] | 450,000 | 50,000 | 4 | 6 | 8 | 4 | 5 | ..... |
| [Illegible] | 600,000 | 150,000 | 5 | 7½ | 10 | 6 | 5 | ..... |
| 600,000 | 750,000 | 150,000 | 5 | 7½ | 10 | 6 | 6 | ..... |
| 750,000 | 800,000 | 50,000 | 5 | 7½ | 10 | 8 | 6 | ..... |
| 800,000 | 1,000,000 | 200,000 | 5 | 7½ | 10 | 8 | 7 | ..... |
| 1,000,000 | 1,500,000 | 500,000 | 6 | 9 | 12 | 10 | 8 | ..... |
| 1,500,000 | 2,000,000 | 500,000 | 6 | 9 | 12 | 12 | 9 | ..... |
| 2,000,000 | 2,500,000 | 500,000 | 7 | 10½ | 14 | 14 | 10 | ..... |
| 2,500,000 | 3,000,000 | 500,000 | 7 | 10½ | 14 | 14 | 11 | ..... |
| 3,000,000 | 3,500,000 | 500,000 | 8 | 12 | 16 | 16 | 12 | ..... |
| 3,500,000 | 4,000,000 | 500,000 | 8 | 12 | 16 | 16 | 13 | ..... |
| 4,000,000 | 5,000,000 | 1,000,000 | 9 | 13½ | 18 | 18 | 14 | ..... |
| 5,000,000 | 6,000,000 | 1,000,000 | 10 | 15 | 20 | 20 | 15 | ..... |
| 6,000,000 | 7,000,000 | 1,000,000 | 10 | 15 | 20 | 20 | 16 | ..... |
| 7,000,000 | 8,000,000 | 1,000,000 | 10 | 15 | 20 | 20 | 17 | ..... |
| 8,000,000 | 9,000,000 | 1,000,000 | 10 | 15 | 22 | 22 | 18 | ..... |
| [Illegible] | 10,000,000 | 1,000,000 | 10 | 15 | 22 | 22 | 19 | ..... |
| [Illegible] | ..... | ..... | 10 | 15 | 25 | 25 | 20 | ..... |

| | | |
|---|---|---|
| Total Estate Tax Shown by this Return..... | | $7103.18 |
| †Credit for estate, inheritance, legacy, or succession tax (see Article 9, Regulations 70, 1926 Edition.... | $25,000 | |
| ‡Credit for gift tax (see Article 9, Regulations 70, 1926 Edition ..... | ..... | |
| Total Credits ..... | ..... | $1775.79 |
| Amount of estate tax payable after subtracting credits..... | ..... | $5325.39 |

*If the decedent's death occurred on the date of the passage of any of the revenue acts imposing the estate tax, care must be exercised to use the rates of tax in force at the exact instant of death. (See Article 1, Regulations 70, 1926 Edition.)

†If the decedent died prior to 4.01 p. m., Washington, D. C., time, June 2, 1924, his estate is not entitled to any credit for estate, inheritance, legacy, or succession taxes paid. (See Article 9, Regulations 70, 1926 Edition.)

‡If the decedent died prior to 4.01 p. m., Washington, D. C. time, June 2, 1924, or subsequent to 10.25 a. m., Washington, D. C., time, February 26, 1926, his estate is not entitled to any credit for gift taxes paid. (See Article 9, Regulations 70, 1926 Edition.)

## JURAT FOR EXECUTORS AND ADMINISTRATORS

We-I, .....
the undersigned execut.....—administrat....., do hereby solemnly swear—affirm that on the..... day of....., 192 , the..... court at..... granted letters testamentary or of administration upon the estate of the foregoing-named decedent to.....; that ..... have made diligent search for property of every kind left by the decedent; that..... have carefully read the instructions printed on this form; that hereon is listed all of the property, tangible and intangible, forming the gross estate of the decedent so far as it has come to ..... knowledge and information; that ..... have carefully read all instructions under Schedule E of this form, and have made diligent and careful search for information as to whether the decedent, during his lifetime, made any transfers without a fair consideration in money or money's worth, and the answers given to the questions therein contained are true and complete to the best of ..... knowledge, information, and belief, and that ..... have no knowledge of any transfers made or trusts created by the decedent within two years of his death involving an amount or value equal to or exceeding $5,000, other than bona fide sales for a fair consideration in money or money's worth, except as stated in Schedule E; that to the best of ..... knowledge, information, and belief the value shown for each item

of property listed in this return was the fair market value of the same at the day of decedent's death; and that the debts, expenses, and charges entered herein as deductions from the gross estate are correct and legally allowable.

JURAT FOR BENEFICIARIES, CUSTODIANS, AND TRUSTEES

I-We, .....
the undersigned beneficiar.....—Custodian—Trustee, do hereby solemnly swear—affirm that ..... have carefully read the instructions printed on this form; that hereon is listed all of the property; tangible or intangible, contained in the gross estate of the decedent which has come into ..... possession and control; that to the best of ..... knowledge, information, and belief, the value shown for each item of property listed hereon was the fair market value of the same at the time of the decedent's death; and that the debts, expenses, and charges entered hereon as deductions from the gross estate are correct and legally allowable.

(Name) .....
Address) .....
(Name) .....
Address) .....
(Name) .....
Address) .....

Subscribed and sworn to before me, at San Diego, Calif. this 2 day of July, 1926.

J. B. McLEES, Co. Clerk.
By L. L. BAILEY, Deputy.

.....

Notary Public—Deputy Collector.

Note.—If there is more than one executor or administrator, all must sign and swear to the return.

(The foregoing jurat may be sworn to before any person authorized to administer oaths.)

Name and address of attorney.....

.....

[103]

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EXHIBIT "F"

TREASURY DEPARTMENT
Washington
Office of
Commissioner of Internal Revenue
MT-ET-Cl.-2953-MMS
District of 6th California
Estate of John W. Mitchell
Date of death, July 2, 1925

Jan. 10, 1928.

Adina Mitchell, Executrix,
Estate of John W. Mitchell,
1063 Ocean Boulevard,
Coronado, California.

Madam:

The Bureau has no record of the receipt of a protest on behalf of the above-named estate against the

tentative findings disclosed in its letter addressed to the executor under date of September 28, 1927, in view of which fact the tentative findings set forth in said letter, a copy of which is attached hereto and made a part hereof, are hereby made final and the deficiency in the estate tax is determined to be $10,273.48.

In accordance with the provisions of Title III of the Revenue Act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the said Board within the 60 day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute

the enclosed Form 890, waiving (1) your right to file a petition with the United States Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

C. R. NASH,

Acting Commissioner.

vd

Enclosures:

Statement,

Waiver—Form 890 [104]

(934M)

CLAIMS

MT—ET—
District—Sixth California
Estate of—John W. Mitchell Sep 28 1927
Date of death—[Illegible] 1925
Tentative deficiency—10,273.48

Adina Mitchell, Executrix,
Estate of John W. Mitchell,
1063 Ocean Boulevard,
Coronado, California.

Madame: The estate tax return filed for the above-named estate has been examined and a deficiency in respect of the tax has been tentatively determined.

If you acquiesce in the deficiency as determined, or in any part thereof, you may sign the enclosed waiver of the restrictions on the assessment of all or so much of the undischarged portion of the deficiency as results from adjustments in which you acquiesce and forward it to the Commissioner of Internal Revenue, Washington, D. C.

If you desire to protest against any portion of the deficiency such protest must be filed with the Commissioner of Internal Revenue within thirty days from the date of this letter. The procedure incident to the filing of a protest is governed by the Regulations relating to Estate Tax, copies of which may be obtained upon application to the Collector or to this office.

This determination is tentative only and no petition herefrom lies to the Board of Tax Appeals. If upon further consideration at the expiration of the thirty day period for filing protest it appears that a deficiency in respect of the tax exists final determination thereof will be made and you will be notified by registered mail in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926. [105]

(934M)—2—Estate of John W. Mitchell
MT—ET—2953—AES—Sixth California

Examination of the return discloses the following:

| | |
|---|---|
| Correct amount of tax | $17,376.66 |
| Tax shown on the return | $ 7,103.18 |
| Deficiency | $10,273.48 |

There will be assessed and collected, as a part of the deficiency, interest thereon at the rate of six per centum per annum from one year after decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

No allowance is made for credit for inheritance taxes paid to the State for the reason that the evidence required by Article 9, Regulations 70, has not been submitted.

Since the full amount of the tax shown on the return was not paid on or before the due date, the

undischarged portion of the returned tax amounting to $1,775.79, bears interest at the rate of one per centum a month from one year after the date of the decedent's death until payment thereof is received by the Collector.

The return has been verified as filed except as to the following changes:

| | Returned | Tentatively Determined |
|---|---|---|
| GROSS ESTATE | $ | $ |
| Stocks and Bonds | | |
| Item 2, | 3,860.00 | 3,800.00 |
| Mortgages, Notes, Cash & Insurance | | |
| Accrued interest, Item 2, | 0.00 | 959.11 |
| Accrued interest, Item 3, | 0.00 | 2,894.35 |
| Accrued interest, Item 4, | 0.00 | 145.35 |
| Cash as per Title Guaranty & Trust Company's books, Trust #822, | 0.00 | 4,788.28 |
| Cash as per Title Guaranty & Trust Company's books, Trust #807, | 0.00 | 6,713.15 |

[106]

3—Estate of John W. Mitchell
MT—ET—2953—AES—Sixth California

| | Returned | Tentatively Determined |
|---|---|---|
| Other Miscellaneous Property | $ | $ |
| Item 2, | 2,500.00 | 3,708.00 |
| Item 5, | 1,000.00 | 1,350.00 |

DEDUCTIONS

| | Tentatively Determined | Returned |
|---|---|---|
| | $ | $ |
| Executrix' commission, | 10,000.00 | 11,500.00 |
| Attorney's fee, | 10,000.00 | 11,500.00 |
| Miscellaneous administration expenses, | 2,830.16 | 14,459.17 |
| Support of dependents, | 40,000.00 | 48,000.00 |
| Wife's separate property, | 28,554.84 | 0.00 |
| To balance, | 11,072.41 | |

Deduction is made of executrix' commission and attorney's fee in the amounts which the investigation disclosed will be paid.

Deduction is made of miscellaneous administration expenses in the amount found upon investigation to be correct.

Deduction is made of support of dependents in the amount found upon investigation to have been paid.

Deduction is made of the wife's separate property which was included in the gross estate of the decedent.

Enclosed herewith is a summary of the returned and determined values of the gross estate, and also the claimed and allowed deductions.

This case has been audited in accordance with the retroactive provision of the Revenue Act of 1926 with respect to rates of tax.

Respectfully,

R. M. ESTES,

Deputy Commissioner.

ENW—Enclosures. [107]

5x Estate of John W. Mitchell Date of death—July 2, 1925
MT—ET—2953—AES—Sixth California

SUMMARY

| | Returned (706) | Tentatively determined on Review |
|---|---|---|
| GROSS ESTATE: | $ | $ |
| Real Estate | 264,700.00 | 264,700.00 |
| Stocks and bonds | 8,756.00 | 8,696.00 |
| Mortgages, notes, cash, and insurance | 491,960.42 | 507,460.66 |
| Jointly owned property | 5,612.95 | 5,612.95 |
| Other miscellaneous property | 124,920.00 | 126,478.00 |
| Transfers | | |
| Powers of appointment | | |
| Propert idenitfied as previously taxed | | |
| Total gross estate | 895,949.37 | 912,947.61 |
| DEDUCTIONS: | $ | $ |
| Funeral expenses | 860.50 | 860.50 |
| Administration expenses— | | |
| Executors' commissions | 11,500.00 | 10,000.00 |
| Attorneys' fees | 11,500.00 | 10,000.00 |
| Miscellaneous | 14,459.17 | 2,830.16 |
| Debts of decedent | 202,934.61 | 202,934.61 |
| Unpaid mortgages | 53,156.54 | 53,156.54 |
| Net losses during settlement | | |
| Support of dependents | 48,000.00 | 40,000.00 |
| Wife's separate property | | 28,554.84 |
| Property identified as previously taxed | | |
| Charitable, public, and similar gifts and bequests | | |

| | | |
|---|---|---|
| Specific exemption (resident decedents only) | 50,000.00 | 50,000.00 |
| Total Deductions | *392,409.82 | 398,336.65 |
| Net estate for tax | **503,439.55 | 514,610.96 |
| Total tax | 7,103.18 | 17,376.66 |
| Tentative Deficiency Tax | | 10,273.48 |
| Credits for estate, inheritance, legacy, or succession tax | | |
| Credit for gift tax | | |

*Should be $392,410.82
** " " $503,539.55

(729M)
Treasury Department
Internal Revenue Bureau
Estate Tax Division
Form 7821A—Revised March 1923

[108]

---

## EXHIBIT G

STATEMENT

SA:WHL
LC

Sep. 19, 1932

In re: Adina Mitchell, Executrix
Estate of John W. Mitchell,
808 Bank of America Building,
Los Angeles, California.
Docket: #36231.
Date of
Death: July 2, 1925

| Estate Tax Liability | Tax Previously Assessed | Deficiency in Assessment of Tax |
|---|---|---|
| $7,914.94 | $5325.39 | $2,589.55 |

| Estate Tax Liability | Tax Previously Paid | Deficiency in Payment of Tax |
|---|---|---|
| $7,914.94 | $5325.39 | $2,589.55 |

The Special Advisory Committee recommendation, agreement to stipulate and sixty-day letter dated January 10, 1928 have been made the basis of the adjustments disclosed in the attached schedules.

[109]

Adina Mitchell, Executrix,
Estate of John W. Mitchell

Date of Death: July 2, 1925

Schedule 1

ADJUSTMENTS TO NET ESTATE

| | | |
|---|---|---|
| Net estate as disclosed by Bureau letter dated September 28, 1927 upon which basis the sixty-day letter dated January 10, 1928 was issued | | $514,610.96 |
| As corrected | | 310,373.49 |
| Net adjustment | | $204,237.47 |
| Additional deductions: | | |
| 1. Attorney's fees | $15,000.00 | |
| 2. Allowance for support of dependents | 20,000.00 | |
| 3. Separate property of the wife | 169,237.47 | |
| Net adjustment as above | | $204,237.47 |

Schedule 1-A

EXPLANATION OF ITEMS. CHANGED.

In accordance with the recommendation of the Committee, the net estate as shown in the sixty-day letter has been adjusted as shown below:

| | |
|---|---|
| 1. Attorney's fees as redetermined | $25,000.00 |
| As determined in sixty-day letter | 10,000.00 |
| Additional deduction | $15,000.00 |
| 2. Amount allowable for support of dependents as redetermined | $60,000.00 |
| As determined in sixty-day letter | 40,000.00 |
| Additional deduction | $20,000.00 |

3. The amount of the separate property of the wife has been redetermined upon the basis of the amount paid to John W. Mitchell as a beneficiary under Trust #750, Title Guarantee and Trust Company, Trustee. [110]

Adina Mitchell, Executrix,
Estate of John W. Mitchell.

Date of Death: July 2, 1925

Schedule 1-A (Continued)

| | |
|---|---|
| Cash paid to J. W. Mitchell | $ 84,912.31 |
| Payment to K. C. Gillette charged to J. W. Mitchell to repay money borrowed | 10,380.00 |
| Paid on mortgage for J. W. Mitchell | 85,000.00 |
| Paid on note of J. W. Mitchell | 17,500.00 |
| Total | $197,792.31 |
| Amount determined in the sixty-day letter as the separate property of the wife | 28,554.84 |
| Additional deduction | $169,237.47 |

Schedule 2

COMPUTATION OF TAX.

| | | |
|---|---|---|
| Net estate subject to tax | | $310,373.49 |
| Estate tax on | $250,000.00 | $5,500.00 |
| Estate tax on $60,373.49 at 4% | 2,414.94 | |
| Estate tax revised | | 7,914.94 |
| Previously assessed, August 1926 list, page 301, line 9 | | 5,325.39 |
| Deficiency in assessment of tax | | $ 2,589.55 |
| Estate tax revised | | $ 7,914.94 |
| Tax paid, July 2, 1926 | | 5,325.39 |
| Deficiency in payment of tax | | $ 2,589.55 |

[111]

Mr. F. E. Collins
Representative
Special Advisory Committee
Los Angeles, California.

Dear Mr. Collins:

The Stipulation of Facts in the Mitchell cases was concluded so hurriedly that there are errors in computation which should be corrected as the Stipulation in its present form presents obvious inconsistencies, in two particulars:

I.

Two paragraphs on pages 5 and 6 read as follows:

"The net taxable income realized from payments made on the notes of F. A. Hartwell for the year 1925 was the sum of $100,969.10, which was credited on the books of trust #822 of which amount the sum of $50,585.55 was received prior to July 2nd, 1925, and the balance, or the sum of $50,484.55, was received between the periods of July 2nd, 1925 and December 31, 1925.

"That immediately following the death of John W. Mitchell, Title Guarantee and Trust Company conveyed a portion of the property to which it held title under Declaration of Trust No. 822 for a total consideration of $87,124.00, less commission and selling expenses of $5,975.25, which consideration was paid in cash at said time. That if the March 1, 1913 value of said property is material to a determination of the net taxable income resulting from said sale, it was the sum of $14,521.39."

Your memorandum for the year 1925 shows collections on the Hartwell notes of $38,625.00. The transcript of the collection on these notes, as furnished to us by the Title Guarantee and Trust Company, shows collections $37,625.00, which is $1,000 less than your figure. We are not disposed to insist on the lower amount, but merely call attention to it in passing. In your computation of profit based on the 1913 value as adjusted you arrived at the

correct percentage of 68.13, which applied to collections gives a gross profit in that year of $26,315.21. With this figure you set up the following for the year 1925:

| | |
|---|---|
| Net Profit on Sales | 26,315.21 |
| Interest | 11,125.90 |
| Net Profit on Real Estate Sold | 66,627.36 |
| Total | 104,068.47 |
| Deductions Allowed | 3,099.37 |
| Net Income as Adjusted | $100,969.10 |

[112]

The item of $66,627.36 representing net profit on land sold was derived from the sale of 218 feet of beach land which, according to the Stipulation as quoted above, was conveyed "immediately following the death of John W. Mitchell." It is therefore apparent that the division of income for the year 1925, as stated in the Stipulation, is incorrect for it is obvious that the income in the portion of the year following the death of Mr. Mitchell must have been in excess of the sum of $66,627.36.

The correct figures for these periods are stated in the attached memorandum showing a computation for the two periods and we submit that the Stipulation should be changed accordingly in order that the Board of Tax Appeals, in considering these, will not be faced with an obvious error.

II.

On the bottom of page 6 and the top of page 7 the

Stipulation recites: "That the March first, 1913, value of the property herein referred to as being sold prior to the death of John W. Mitchell was as follows:

| | |
|---|---|
| Vermont Avenue | 166,600.00 |
| Cahuenga Acreage | 145,000.00 |
| Beach property | 14,521.39" |

This last item of value for the beach property should be $97,338.20, which is the amount given in your computations for 1460 feet at $66.67 per foot. The amount given in the Stipulation is the value of the 218 feet sold after the death of Mr. Mitchell, which amount is correctly set up on page 6 of the Stipulation in the paragraph which has been quoted above.

The Stipulation should therefore be amended to state the correct value of the beach property sold at the stipulated amount.

Statements as rendered by the Title Guarantee and Trust Company showing payments on the Hartwell notes and your memorandum of computations is attached as a basis for the foregoing.

10/19/33

Mr. Collins:

The foregoing portion of this letter has been prepared by Judge Edmonds who forwarded the subject matter to me in rough form; I am passing it on to you knowing of your familiarity with the case and trusting that we might receive from you an expression as whether or not the errors as here de-

picted are correct to the end that we might be able to advise Mr. Mather in the premises.

I would thank you to kindly return to me the enclosed exhibits when they have served their purpose.

Truly,

RALPH W. SMITH (Signed)

Enclosure: 7 Exhibits. [113]

| | Gross Amounts | | | Profit Subject to Tax (68.13% of Gross Amount) of Principal Plus 100% of Interest | | Total |
|---|---|---|---|---|---|---|
| | Before July 2 | After July 2 | Total | Before July 2 | After July 2 | Subject To Tax |
| Paid on Principal | 2,715.00 | 26,040.00 | 28,755.00 | 1,849.72 | 17,741.05 | 19,590.77 |
| " " " | 1,530.00 | 7,340.00 | 8,870.00 | 1,042.38 | 6,043.13 | 7,085.51 |
| | $ 4,245.00 | 33,380.00 | 37,625.00 | 2,892.10 | 23,784.18 | 26,676.28 |
| Interest | 2,317.50 | —— | 2,317.50 | | | |
| | 8,808.60 | —— | 8,808.60 | | | |
| | 11,126.10 | | 11,126.10 | 11,126.10 | —— | 11,126.10 |
| | | | | 14,018.20 | 23,784.18 | 37,802.38 |
| Less Deductions Allowed | | | | 3,099.37 | —— | 3,099.37 |
| | | | | 10,918.83 | 23,784.18 | 34,703.01 |
| Profit on Sale of 217.81 Feet | | | | | 66,627.36 | 66,627.36 |
| | | | | $10,918.83 | $90,411.54 | $101,330.37 |

[114]

TREASURY DEPARTMENT
Los Angeles, California,
October 20th, 1933.

Office of
Commissioner of Internal
Revenue
Address reply to
Commissioner of Internal Revenue
And refer to
SA:WHL
TEC

Mr. Ralph W. Smith,
808 Bank of America Building,
Los Angeles, California.
My dear Mr. Smith:

Reference is made to your letter of October 19th, 1933, regarding errors in the stipulation of fact filed in the Mitchell cases.

With respect to the first item it is customary, when necessary to prorate the income of a business for a period of less than a year, to divide the years income on the basis of the number of months involved. Thus in the case of Trust No. 822 the total income for the year 1925 was divided on the basis that 6/12ths of the total was earned before Mr. Mitchell's death and 6/12ths after his death. It is undoubtedly true in this particular case that the Beach property was sold after July 1, 1925 and the resulting profit was earned in the last six months

period. I do not believe, however, that Mr. Mather would be willing to agree to a change on the basis that this particular profit was earned after July 1st and that all other earnings were earned equally before and after that date. In other words if the method of prorating by months is not used then it will be necessary to show just what the actual net earnings were from January 1 to July 2 and from July 3 to December 31, 1925.

With respect to the second item it is undoubtedly true that the beach frontage sold before Mr. Mitchell's death had a March 1, 1913 value of $97,338.20 on the basis of $66.67 per foot for 1,460 feet, and that the valuation of $14,521.39 stipulated was for the 218 feet sold after Mr. Mitchell's death. I assume that Mr. Mather will have no objection to correcting the stipulation in this respect but I have no further connection with the case and it is a matter that will have to be taken up with the General Counsel in Washington.

Respectfully,

F. E. COLLING (Signed)
Representative, Special Advisory Committee.

Enclosures:
Exhibits forwarded with your letter [115]

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[Title of Court and Cause—Docket Nos. 47516, 66584, 70861.]

Promulgated December 28, 1934.

1. Income—Joint Tenancy in Trust Corpus.—Where separate properties of husband and wife

were conveyed in trust for purposes of furnishing security in certain business deals of husband, who was named as beneficiary under each trust, and later all such properties were reconveyed under one trust designating husband and wife as beneficiaries under a joint tenancy with right of survivorship, it is held that each was entitled to one half of the income of the trust, and, following the death of the husband, all of such income was the property of and taxable to the wife.

2. Penalties.—Where no returns are ever filed by the taxpayer, the imposition of 25 percent penalties is mandatory. Scranton, Lackawanna Trust Co., Trustee, Katherine W. Murray Trust, 29 B. T. A. 698, followed.

Ralph W. Smith, Esq., Claude I. Parker, Esq., and L. A. Luce, Esq., for the petitioner.

Thomas M. Mather, Esq., for the respondent.

## OPINION.

LEECH: These proceedings were duly consolidated for hearing. Under Docket No. 47516 the petitioner seeks redetermination of deficiencies of $5,742.99 for the calendar year 1924 and $11,270.77 for the period from January 1 to July 2, 1925, the date of death of decedent, John W. Mitchell. At the hearing it was formally stipulated by the parties that the deficiency for the calendar year 1924 is the sum of $4,048.04. This leaves for consideration in this docket the deficiency for the year 1925.

Under Docket No. 66584 petitioner, as administrator of the estate of Adina Mitchell, seeks redeter-

mination of deficiencies and penalties asserted against his decedent for years and in amounts as follows: [116]

| | Deficiency | Penalty |
|---|---|---|
| Period July 2 to Dec. 31, 1925 | $5,669.58 | $1,417.39 |
| 1926 | 4,095.80 | 1,023.95 |
| 1927 | 3,623.49 | 905.87 |
| 1928 | 4,551.08 | 1,137.77 |

Under Docket No. 70861 petitioner, as administrator of the estate of Adina Mitchell, seeks redetermination of a deficiency of $17,600.17 and penalty of $4,400.04 asserted against his decedent for the calendar year 1925. This latter deficiency includes the deficiency for a portion of the year 1925 included in the appeal under Docket No. 66584.

The deficiencies in question arise from respondent's treatment of the profit accruing in the several years on certain properties held in trust. It is contended by him that the two decedents, John W. Mitchell and Adina Mitchell, held a joint tenancy in such property with right of survivorship and that Adina Mitchell having survived her husband, John W. Mitchell, one half of the income during the period January 1 to July 2, 1925, the date of John W. Mitchell's death, was taxable to each of the petitioners and that the entire income from the property for the balance of the year 1925 and for the years 1926, 1927, and 1928 was taxable to Adina Mitchell.

The facts are formally stipulated and we include the stipulation by reference as our findings of fact.

Briefly stated the facts are that John W. Mitchell died July 2, 1925, and his wife, Adina Mitchell, died April 20, 1931. At the time of their marriage Mrs. Mitchell had separate property of $10,000 and subsequently inherited additional funds. These funds of Mrs. Mitchell were used many years ago in the purchase of land at Vermont Avenue and Beverly Boulevard in Los Angeles, California, on which a home was built and occupied for many years by the couple. The title to this property was in Mrs. Mitchell.

Sometime between 1888 and March 1, 1913, John W. Mitchell acquired two parcels of real estate. Subsequent to the year 1913 Mr. Mitchell, in the course of certain business transactions in which he was engaged and for the purpose of furnishing necessary security for loans made him and to effect the subdivision and sale of some of the properties, had conveyed in trust the two properties which he individually owned, and secured the conveyance in trust by Mrs. Mitchell of the home property. The beneficiary under each trust was John W. Mitchell.

On April 1, 1924, John W. Mitchell, under power vested in him under the trusts, caused the trustee in all three of the trusts men- [117] tioned above to issue one declaration of trust in respect of the properties held under these three trusts. This declaration of trust provides in part as follows:

> WHEREAS it was the intention of John W. Mitchell and Adina Mitchell, his wife, that all of said properties should be held by them as

joint tenants, with right of survivorship.

NOW THEREFORE THIS IS TO WITNESS that TITLE GUARANTEE AND TRUST COMPANY at the request of JOHN W. MITCHELL and ADINA MITCHELL, his wife, declares that it holds the said trusts and all assets thereof in Trust for JOHN W. MITCHELL and ADINA MITCHELL, his wife, as joint tenants, with right of survivorship * * *.

Certain of the property held under the above trust consisted of notes representing deferred payments of the purchase price of certain portions of the real property deeded in trust and which had been sold by the trustee. These deferred payments included unrealized profits on the sales. Upon the death of John W. Mitchell on July 2, 1925, Adina Mitchell was appointed as executrix of his estate, and in reporting such estate for Federal tax included the notes held by the trustee as part of the corpus of that estate. She filed no personal income tax return for herself for the year 1925 or the three following years. In 1930 delinquent returns were prepared for Mrs. Mitchell by a deputy collector for the period July 2 to December 31, 1925, and for the years 1926 and 1927. These returns were filed with the collector of internal revenue for the sixth district of California on February 7, 1930. For the year 1928 a return was prepared for Mrs. Mitchell by a deputy collector and filed with the same collector on November 4, 1930.

In determining the deficiencies here in question the respondent has included in income of the decedent, John W. Mitchell, one half of the profit derived from the trust property for the period January 1 to July 2, 1925. In determining the deficiencies against the decedent, Adina Mitchell, he has included in her income for the year 1925 one half of the income from the trust property for the period January 1 to July 2, 1925, and all of the income from such properties for the balance of that calendar year and for the three succeeding years. For each of these years respondent has asserted a delinquency penalty against this taxpayer upon her failure to file returns.

The answer to the question here involved is determined by the character of the estate possessed by John W. Mitchell and Adina Mitchell in the trust property at the time of his death on July 2, 1925. The property in question was held under an indenture of trust providing specifically that the interests of these two parties were as "joint tenants with right of survivorship." It necessarily follows that if their titles were those of joint tenants, Adina Mitchell [118] did not take the property as an heir or devisee of her husband but as survivor. She succeeded to no new title or right but from that time forward was entitled to the absolute estate. Carter v English, 15 Fed. (2d) 6.

It is contended by counsel for petitioner that under the last declaration of trust no joint tenancy was created as one of the parties to that conveyance

was the husband, in whom there was an interest prior to such conveyance. He admits an inability to find a decision by the California courts on this question, but contends that the weight of authority is that a joint tenancy cannot thus be created.

We have considered this question carefully and cannot agree that the weight of authority is as contended by petitioner's counsel. In many jurisdictions the rule is to the contrary and the conclusion there reached sustaining a joint tenancy under these conditions has been by courts of recognized learning and ability. Lawton v. Lawton, 48 R. I. 134; 136 Atl. 241; Ames v Chandler, 265 Mass. 428; 164 N. E. 616; Colson v. Baker, 87 N. Y. S. 238; Saxon v. Saxon, 93 N. Y. S. 191.

Section 683 of the Civil Code of California provides "a joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." We think that the provision of the trust instrument in this case brings it within the definition of the statute. The purpose of the quoted section of the code is stated by the Code Commission of California to be the recognition of a joint tenancy if expressly declared.

We hold that under the declaration of trust, #822 "B", made a part of the stipulation filed, the two decedents, John W. Mitchell and Adina Mitchell, took interests as joint tenants in the trust property

and that the decedent, John W. Mitchell, was entitled to one half of the profits from this property from January 1 to July 2, the date of his death, and that the balance of the profit from the trust property for the calendar year 1925 and all of the profit from such property for the calendar years 1926, 1927, and 1928 was taxable to the decedent, Adina Mitchell.

As to the several 25 percent penalties determined, despite the fact that there may have been reasonable cause for failure to file timely returns for the years in question, no returns were filed by the taxpayer. The filing of them by the deputy collector is not a filing by the taxpayer. Reasonable cause was, therefore, no defense, and the imposition of the penalties was mandatory. Section 3176 of Revised Statutes, as amended; Scranton, Lackawanna Trust Co., Trustee, [119] Katherine W. Murray Trust, 29 B. T. A. 698; John B. Nordholt, 4 B. T. A. 509.

In reference to the contention by petitioner that the statute of limitations has barred recovery of any deficiency, it need only be stated that no returns were filed by the taxpayer, Adina Mitchell, and consequently the statute did not begin to run until the filing for her of returns by a deputy collector, and that the deficiency letter in each case was mailed within the period of three years from that date. It is stipulated that a return was filed for the taxpayer, John W. Mitchell, by Adina Mitchell as executrix, for the period January 1 to July 2, 1925. The date this return was filed is not disclosed and

it follows that petitioner has failed to show that the statutory period for assessment and collection of the deficiency for that year has elapsed. Assessment and collection of the deficiencies are not barred.

Judgment will be entered under Rule 50. [120]

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[Title of Court and Cause—Docket Nos. 47516, 66584, 70861.]

NOTICE OF SETTLEMENT.

The annexed proposed determinations under the opinion of the Board of Tax Appeals heretofore rendered herein, will be presented to the Board for settlement on the ..... day of ....., 1935.

This notice of proposed determinations is submitted in accordance with the decision of the Board without prejudice to the Commissioner's right to contest the correctness of the decision pursuant to the statute in such cases made and provided.

(Signed) ROBERT H. JACKSON
Assistant General Counsel
for the
Bureau of Internal Revenue.

Of Counsel:
T. M. MATHER,
Special Attorney,
Bureau of Internal Revenue.
tm 1/28/35 [121]

## STATEMENT OF RECOMPUTATION

IT:AR:BTA-Recomp.
ET

In re: Douglas L. Edmonds, Administrator, Estate of Adina Mitchell, Deceased, Los Angeles, California.

B.T.A. Docket: #66584
Years: 1926, 1927, 1928.

### INCOME TAX LIABILITY

| Years | Income tax Liability | Income Tax Assessed | Deficiency | Penalty |
|---|---|---|---|---|
| 1926 | $ 5,032.09 | None | $5,032.09 | $1,258.02 |
| 1927 | 3,452.89 | None | 3,452.89 | 863.22 |
| 1928 | 4,420.80 | None | 4,420.80 | 1,105.20 |
| Totals | $12,905.78 | None | $12,905.78 | $3,226.44 |

| | 1926 | |
|---|---|---|
| Net income shown by the sixty-day letter dated April 16, 1932 | | $43,774.55 |
| Add: | | |
| Profit from the sale of real estate | | 5,448.94 |
| Net income adjusted | | $49,223.49 |

| | 1927 | 1928 |
|---|---|---|
| Net income shown by the sixty-day letter dated April 16, 1932 | $40,822.62 | $46,465.92 |
| Deduct: | | |
| Profit from the sale of real estate | 1,082.52 | 766.37 |
| Net income adjusted | $39,740.10 | $45,699.55 |

It was stipulated before the United States Board of Tax Appeals that the petitioner realized income from real estate and interest income as shown below, the income being received through Trust 822-B. [122]

STATEMENT OF RECOMPUTATION

| Years | Property Sold | Taxable Income Received as Adjusted Including Interest Income | Amount Included in Sixty-day Letter |
|---|---|---|---|
| 1926 | Cahuenga Acreage (Trust 822) and Beach Property (Trust 807) | $49,223.49 | $43,774.55 |
| 1927 | Cahuenga Acreage (Trust 822) | 39,740.10 | 40,822.62 |
| 1928 | Cahuenga Acreage (Trust 822) | 45,699.55 | 46,465.92 |

COMPUTATION OF TAX

1926

| | |
|---|---|
| Net income adjusted | $49,223.49 |
| Less: | |
| Personal exemption | 1,500.00 |
| Net income subject to normal tax | $47,723.49 |
| Normal tax at 1½% on $4,000.00 | $ 60.00 |
| Normal tax at 3% on $4,000.00 | 120.00 |
| Normal tax at 5% on $39,723.49 | 1,986.17 |
| Surtax on $49,223.49 | 2,879.05 |
| Total | $ 5,045.22 |
| Less: | |
| Earned income credit on $5,000.00 | 13.13 |
| Tax liability | $ 5,032.09 |

| | | |
|---|---|---|
| 25% penalty for delinquency, ¼ of $5,032.09 | | 1,258.02 |
| Total amount assessable | | $ 6,290.11 |
| Tax previously assessed | None | |
| Penalty previously assessed | None | None |
| Deficiency in tax | | $ 5,032.09 |
| Penalty | | 1,258.02 |
| Total | | $ 6,290.11 |

[123]

## STATEMENT OF RECOMPUTATION

### COMPUTATION OF TAX—1927

| | |
|---|---|
| Net income adjusted | $39,740.10 |
| Less: | |
| Personal exemption | 1,500.00 |
| Net income subject to normal tax | $38,240.10 |
| Normal tax at 1 1/2% on $4,000.00 | $ 60.00 |
| Normal tax at 3% on $4,000.00 | 120.00 |
| Normal tax at 5% on $30,240.10 | 1,512.01 |
| Surtax on $39,740.10 | 1,774.01 |
| Total | $3,466.02 |
| Less: | |
| Earned income credit on $5,000.00 | 13.13 |
| Tax liability | $ 3,452.89 |

| | | |
|---|---|---|
| 25% penalty for delinquency, 1/4 of $3,452.89 | | 863.22 |
| Total amount assessed | | $ 4,316.11 |
| Tax previously assessed | None | |
| Penalty previously assessed | None | None |
| Deficiency in tax | | $ 3,452.89 |
| Penalty | | 863.22 |
| Total | | $ 4,316.11 |

COMPUTATION OF TAX—1928

| | |
|---|---|
| Net income adjusted | $45,699.55 |
| Less: | |
| Personal exemption | 1,500.00 |
| Net income subject to normal tax | $44,199.55 |
| Normal tax at 1 1/2% on $4,000.00 | $ 60.00 |
| Normal tax at 3% on $4,000.00 | 120.00 |
| Normal tax at 5% on $36,199.55 | 1,809.98 |
| Surtax on $45,699.55 | 2,433.95 |
| Total | $ 4,433.93 |

ET/NK [124]

| | | |
|---|---|---|
| Brought forward | | $4,433.93 |
| Less: | | |
| Earned income credit on $5,000.00 | | 13.13 |
| Tax liability | | $4,420.80 |
| 25% penalty for delinquency, 1/4 of $4,420.80 | | 1,105.20 |
| Total amount assessable | | $5,526.00 |
| Tax previously assessed | None | |
| Penalty previously assessed | None | None |
| Deficiency in tax | | $ 4,420.80 |
| Penalty | | 1,105.20 |
| Total | | $ 5,526.00 |

ET/NK

[Endorsed]: Filed Jan. 29, 1935. [125]

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[Title of Court and Cause.—Docket Nos. 47516, 66584, 70861.]

## MOTION FOR RECONSIDERATION AND REHEARING.

In presenting this motion for reconsideration and rehearing the petitioner respectfully contends:

1. That the notes and monies here involved are not, under the facts and law, both corpus of the estate of John W. Mitchell, deceased, and income to Adina Mitchell, his surviving wife, for the years here involved.

2. That if the said promissory notes and monies constitute corpus of the estate of John W. Mitchell,

deceased, that said notes and monies are not properly income to Adina Mitchell.

3. That if it should be held that the notes and monies are income to Adina Mitchell, then the petitioner is entitled to have the deficiency proposed against Adina Mitchell reduced by [126] the amount of estate tax paid on the notes and monies here involved as corpus of the estate of John W. Mitchell, deceased.

4. The petitioner urgently contends, however, that the notes and monies here involved constituted corpus of the estate of John W. Mitchell for two reasons:

(a) If said notes and monies were joint tenancy properties they constituted corpus of the estate of John W. Mitchell and not income to Adina Mitchell.

(b.) Petitioner further contends, however, that the notes and monies were NOT joint tenancy properties but were the individual properties of John W. Mitchell, deceased and therefore properly corpus of his estate rather than income to Adina Mitchell.

(c) Therefore in any event, whether the notes and monies were joint tenancy properties or were the individual properties of John W. Mitchell, deceased, they constituted corpus of the estate of John W. Mitchell rather than income taxable to Adina Mitchell.

To sum up petitioner's position in this case it is contended that the notes and monies were corpus of the estate of John W. Mitchell and not income to Adina Mitchell, but that in the alternative, if

the Board should decide that the notes and monies were income to Adina Mitchell then she was and is entitled to have the deficiency proposed against her reduced by the estate tax paid on the said notes and monies which were included in the estate tax return of John W. Mitchell, deceased. [127]

The principal issue in this proceeding is whether any part of the payments made during the years here involved on certain promissory notes known as the "Hartwell notes" constituted taxable income to the decedent, Adina Mitchell. The notes may he described as follows:

Note for $295,000 drawn in 1923 and payable to John W. Mitchell;

Note for $90,000 drawn in 1923 and payable to John W. Mitchell (page 3, Stipulation of Facts).

Upon the death of John W. Mitchell on July 2, 1925 his executrix reported these notes as corpus of his estate, in the Federal Estate Tax filed (page 3, Opinion of the Board).

The inclusion of the principal of these notes in the estate tax return was approved by respondent. As a matter of fact respondent proposed a deficiency in the estate tax of John W. Mitchell, deceased; the deficiency was finally stipulated to be $2,589.55, and the Board entered an order finally determining said sum as deficiency in estate tax due from Estate of John W. Mitchell (page 6, Stipulation of Facts).

In the instant proceeding, the respondent attempts to tax payments made on the principal of the said notes as income to Adina Mitchell (now de-

ceased) for the years 1925, 1926, 1927 and 1928. This in spite of the fact that the said notes were included in their entirety as corpus in the Federal Estate Tax return of John W. Mitchell, deceased and Federal Estate Tax paid thereon. [128]

Likewise, there was reported in the Federal Estate Tax Return of John W. Mitchell, deceased, the sum of $81,148.75, an amount derived by the Title Guarantee and Trust Company as trustee for John W. Mitchell from the sale of Santa Monica real estate. This amount was entered in the estate tax return (Exhibit E, Schedule C, item 1) as cash on hand. This amount was accepted by the Commissioner as corpus of the estate and Federal estate tax paid thereon.

The Commissioner now determines that said sum of $81,148.75 is income to Adina Mitchell and that a portion of said sum is taxable as profit to her from the sale of real property.

Thus the Commissioner would treat as taxable income to Adina Mitchell, large sums of money which he has already agreed are corpus of the estate of John W. Mitchell, deceased, and upon which the Commissioner has long since collected estate tax.

Under the recent decision of the Supreme Court of the United States in Bull v. The United States (decided April 29, 1935 and reported at paragraph 9346, Vol. 3, 1935 edition, Commerce Clearing House) the above items cannot be corpus of the estate of John W. Mitchell, deceased, and also income to Adina Mitchell.

Therefore, relying upon Bull v. The United States, supra, the petitioner respectfully asks reconsideration of the decision of the Board in this cause. [129]

In Bull v. The United States, supra, the Supreme Court stated in part as follows:

> "The petitioner included in his estate tax return, as the value of Bull's interest in the partnership, only $24,124.20, the profits accrued prior to his death. The Commissioner added $212,718.79, the sum received as profits after Bull's death, and determined the total represented the value of the interest. The petitioner acquiesced and paid the tax assessed in full in August, 1921. He had no reason to assume the Commissioner would adjudge the $212,718.79 income and taxable as such. Nor was this done until July, 1925. The petitioner thereupon asserted, as we think correctly, that the item could not be both corpus and income of the estate." (underlining supplied)

The instant proceeding presents even a stronger set of facts for the petitioner than Bull v. United States, supra. Here we have involved not partnership profits but actual securities (promissory notes) and a sum of cash money included in the estate and taxed as corpus. Nevertheless, the payments on the principal of the notes and a portion of the actual cash money have been treated by the respondent as income to Adina Mitchell individually although the notes and the money were actually determined by re-

spondent to be corpus of the estate of John W. Mitchell.

If the notes and money were not properly corpus of the estate of John W. Mitchell, this petitioner is entitled, under the Bull decision to set off against the deficiencies proposed, the estate tax paid on the notes and the money as corpus. As said by the Supreme Court, the retention of both the estate tax and the income tax on the same items would be immoral.

We think, however, that the notes and the money were properly corpus of the estate of John W. Mitchell and not the income of Adina Mitchell. [130]

We do not believe that the notes and the money were joint tenancy properties, but even though the notes and the money were joint tenancy properties, they were properly corpus of the estate of John W. Mitchell under the decision of this Board in Appeal of Emma Melczer, Executrix et al, 23 B. T. A. 124. In that case the Board found that the entire value of the California property held by the decedent and his wife as joint tenants should be included in the gross estate of the decedent and made subject to Federal estate tax as corpus of the decedent's estate.

The petitioner in the Melczer case relied on Carter v. English, 15 Fed. (2d) 6 which approved the doctrine of In re Gurnsey's Estate, 177 Cal. 211, 170 Pac. 402 and held that no part of property held in joint tenancy should be included in the estate of

a deceased joint tenant, under the Revenue Act of 1916.

The doctrine of In re Gurnsey's Estate supra was that title to joint tenancy property does not vest in the survivor upon the death of the cotenant, but that title to the property vested in the surviving joint tenant from the time of the original grant.

In Gwinn v. Commissioner, 287 U. S. 224, the Supreme Court refused to follow Carter v. English supra and In re Gurnsey's Estate supra. The Supreme Court held that the death of the cotenant became the generating source of definite accessions to the survivor's property rights. [131]

In the Appeal of Melczer, supra (page 129 of 23 B.T.A.) the Board clearly stated that it did not agree with the view of the Court in Carter v English, supra.

However, in the instant case, Carter v. English, supra is cited (page 4) by the Board in its opinion as authority for its decision that the payments on the principal on the notes and the sum of $81,148.75 constituted income to Adina Mitchell.

It is submited that Carter v. English, supra, has been followed neither by this Board nor the Supreme Court of the United States as shown hereinabove. Therefore that decision should not be followed in the instant case to tax the notes and the money as income to Adina Mitchell. Under the decision of the Board in Appeal of Melczer, supra and the decision of the Supreme Court in Gwinn v. Commissioner, supra, if the notes and the money

were joint tenancy properties, they were part of the corpus of the Estate of John W. Mitchell and not income to Adina Mitchell. Also, the Commissioner treated the notes and the money as part of the corpus of the Estate of John W. Mitchell and collected estate tax thereon. He should not be allowed to subject these properties to an estate tax as part of the corpus of the Estate of John W. Mitchell and then tax them a second time as income to Adina Mitchell.

Also, it seems unfair to California taxpayers for the Board to refuse to follow Carter v. English supra for estate tax purposes and then to follow that decision in taxing the properties here involved as income to Adina Mitchell.

It is therefore submitted that if the notes and money were joint tenancy properties, they were a part of the corpus of [132] the Estate of John W. Mitchell and not income to Adina Mitchell.

Clearly, if the notes were not joint tenancy properties, they certainly were not income to Adina Mitchell but were corpus of the Estate of John W. Mitchell.

We therefore finally pass to the question whether the "Hartwell notes" were joint tenancy properties or the individual properties of John W. Mitchell prior to his death.

In deciding that the notes and monies were joint tenancy properties, the Board on page 3 of its opinion quotes a portion of the Declaration of Trust 822 B, which is the document introduced as evidence and identified in the record as Exhibit "D."

It is respectfully desired to call attention to a particular portion of Exhibit "D" not quoted by the Board in the opinion. This most pertinent portion of Exhibit "D" provides as follows:

> "NOW THEREFORE THIS IS TO WITNESS THAT TITLE GUARANTEE AND TRUST COMPANY, at the request of JOHN W. MITCHELL AND ADINA MITCHELL, his wife, declares that it holds the said Trusts and all assets thereof in Trust for John W. Mitchell and Adina Mitchell his wife, as joint tenants, with right of survivorship, subject to all the terms of any assignment or assignments heretofore made to secure any indebtedness in favor of L. C. BRAND, with additional provisions that the said Trusts shall also secure any indebtedness of the TITLE GUARANTEE AND TRUST COMPANY, and further, the parties hereto hereby assign to TITLE GUARANTEE AND TRUST COMPANY all notes in favor of John W. Mitchell given as part of the purchase price on the sale of properties covered by said Trusts, and in event of a default in the payment of any indebtedness in favor of L. C. BRAND, or TITLE GUARANTEE AND TRUST COMPANY, of any kind or nature, or for any purpose whatsoever, it is a provision hereof that the Trustee may sell the interests of JOHN W. MITCHELL and ADINA MITCHELL, his wife, in and to said Trusts or trust deeds as herein [133] provided, and with-

> out the necessity of making demand on the said parties, or the survivor thereof, which said sale shall be in the following manner, namely:—"

The underscored language is all important and should be given due consideration. The notes were assigned to the Title Guarantee and Trust Company to cover the indebtedness of Mr. Mitchell.

The so-called declaration of trust No. 822-B (Exhibit D) provides for two different things. First, the agreement recites that whereas John W. Mitchell was the beneficiary named in the declarations of trust previously executed and that he and Mrs. Mitchell desired that they should be the beneficiaries thereof in joint tenancy, that thereafter the trustee holds the said trusts and all the assets thereof in trust for John W. Mitchell and Adina Mitchell, his wife, as joint tenants with right of survivorship, subject to all the terms of any assignment or assignments theretofore made to secure any indebtedness in favor of L. C. Brand, with additional provisions that the said trust shall also secure any indebtedness of the Title Guarantee and Trust Company. That is the first subject covered by the Agreement.

Continuing, the instrument (Exhibit D) recited:

> "And further the parties hereto hereby assign to Title Guarantee and Trust Company all notes in favor of John W. Mitchell given as part of the purchase price on the sale of property covered by said trusts."

In other words, the instrument recognizes that the notes were not part of the "assets" described in the first subject covered but confirms their hypothecation by Mr. Mitchell to his creditor Title Guarantee and Trust Company, for money [134] theretofore borrowed, a transaction entirely independent of the trusts.

We have shown by the stipulation of facts (page 4) that at the time these notes "were executed and delivered by the payees thereof, said John W. Mitchell deposited them with Title Guarantee and Trust Company as collateral security for the payment of certain indebtedness then owing by him to it. Said notes continued to be held by said Title Guarantee and Trust Company during the taxable periods here in question.

In order to ascertain what the intention of the parties was at the time of the execution of this instrument it is necessary to have the situation then existing clearly before us. The stipulation of facts shows that the Title Guarantee and Trust Company was not a discretionary trustee but merely a custodian and naked trustee (holding only title). Trustee held certain real property in this custodian trust. Other real property originally conveyed to it under this trust, which trust was always revocable in form, had been ordered sold by the beneficiary and Mr. Mitchell had taken notes for the purchase price which it is stipulated were then in the possession of his creditor as security for an indebtedness.

The proper construction of the instrument (Exhibit D) in the light of these facts is that Mr. and Mrs. Mitchell provided by its terms that they should thereafter be the beneficiaries of said trusts and that the hypothecation of notes was confirmed but without any change of title as to them. [135]

An analysis of Exhibit D shows that there is no statement that Mr. and Mrs. Mitchell were to be the owners of the notes in joint tenancy. Not only the instrument, but the determination on the Federal estate tax clearly show that Mrs. Mitchell did not take the notes as her property and the recitals in Exhibit D show that the notes were the property of Mr. Mitchell and that Mrs. Mitchell merely transferred to the Title Guarantee and Trust Company any rights to the notes which she might have as the wife of John W. Mitchell as security for money which Mr. Mitchell had borrowed from it.

The incontrovertible facts show that the notes were held by the Title Guarantee and Trust Company as pledgee. They belonged to John W. Mitchell, subject to the terms of the pledge, and were correctly returned for Federal Estate Tax purposes as part of his estate. All income from them has been returned as income of the estate and Adina Mitchell should not be taxed for any part thereof.

The respondent's statement of recomputation filed under Rule 50 states the following:

> "It was stipulated before the United States Board of Tax Appeals that the petitioner realized income during the year 1925, from the

sale of real estate and interest income as shown below, the income being received through Trust 822 B."

This is inaccurate. the stipulation provided:

"The net taxable income realized from payments made on the notes of F. A. Hartwell and the sale of property mentioned in the next paragraph for the year 1925 was the sum of $100,-969.10, which was credited on the books of trust 822, of which amount the sum of $50,585.55 was received prior to July 2nd, 1925 and the balance, or the sum of [136] $50,484.55 was received between the periods of July 2nd, 1925 and December 31, 1925.

"That immediately following the death of John W. Mitchell, Title Guarantee and Trust Company conveyed a portion of the property to which it held title under Declaration of Trust No. 822 for a total consideration of $87,124.00, less commission and selling expenses of $5,975.25, which consideration was paid in cash at said time. That if the March 1, 1913 value of said property is material to a determination of the net taxable income resulting from said sale, it was the sum of $14,521.39."

From the foregoing it appears that the notes were the individual properties of John W. Mitchell before his death; that they were properly included as part of the corpus of his estate in the return filed after his death; and that payments on the principal

of the notes did not constitute taxable income to Adina Mitchell. The same is true of the $81,148.75 included in the Estate Tax Return of John W. Mitchell as cash on hand.

WHEREFORE, it is prayed that this motion be granted and that the Board redetermine that the notes and monies here involved were not income to Adina Mitchell but corpus of the Estate of John W. Mitchell, deceased; and in the alternative, if the Board should determine that the notes and monies were income to Adina Mitchell, then Adina Mitchell is entitled to have the proposed deficiency against her reduced by the Estate Tax paid on the notes and monies included in the Estate Tax Return as corpus of the Estate of John W. Mitchell, now deceased.

Respectfully submitted, [137]
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Washington, D. C.
Counsel for petitioners [138]

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[Title of Court and Cause.—Docket Nos. 47516, 66584, 70861.

MEMORANDUM AND ORDER.

These consolidated proceedings come before us now upon motion by petitioner for rehearing or for

reconsideration of our opinion promulgated herein December 28, 1934.

Petitioner contends that our opinion is in error in its conclusion; that, with respect to the properties held in trust by the Title Guaranty and Trust Company for John W. Mitchell and his wife, a joint tenancy with right of survivorship existed in those parties. It is argued that the rule recognized by the California Courts, under the statutes of that state, preserves the essential requirements of the common law in reference to such an estate, namely, the unities of interest, title, time and possession. It is insisted that these four unities did not exist as to John W. Mitchell and his wife in the properties involved. We have given careful consideration to the argument of counsel for the [139] petitioner and to the brief submitted, including the authorities cited, and, after due consideration, are not satisfied that the rule urged would be applied by the Courts of California to the present facts. In addition to this, it would appear that the record in these proceedings establishes the existence of the four unities included in that rule. It seems the fact has been overlooked that conveyance of the legal title to the properties, formerly held by Mitchell and his wife as their separate properties, or as parts of the community, was made to a third party, the trustee. Even in those jurisdictions which recognize the strict common law rule it is held that the requirements of that rule are met by a conveyance to a third party and a reconveyance in joint tenancy by the latter. In a convey-

ance of that character to a third party it is apparent that such party holds it only in trust for purposes of reconveyance, yet the requirements of the rule are met. The rule is one of law and applies to the legal title. Here the parties have conveyed the legal titles to the properties to a trustee. The reconveyance of these titles in joint tenancy by that trustee satisfied the common law rule. The holding of such equitable title or beneficial interest to the properties, by Mitchell and his wife, in joint tenancy with right of survivorship, as provided by the declaration of trust, was therefore a joint tenancy.

Petitioner contends that certain of the proceeds from these properties, held in the opinion questioned here, to represent income to the taxpayers, was returned as corpus of the estate of John W. Mitchell, and estate tax paid thereon and, that there is, accordingly, a credit due for such payment. In answer, it need only be said that, in this proceeding, we have jurisdiction only to determine the correct tax liability of the estates of John W. and Adina Mitchell [140] for income taxes for the years involved. The case of Ernest W. Bull, Executor v. United States, ..... U.S. ....., decided April 29, 1935, upon which petitioner relies on this point, is readily distinguishable on the facts and issues presented. If overpayment of estate taxes has been made upon the basis of the return filed for the estate of John W. Mitchell, it is a matter for correction and refund, by a proceeding brought for that purpose, if not barred under applicable statutes.

In view of our conclusion above stated, it is hereby ORDERED that petitioner's motion for rehearing or reconsideration be and the same is hereby denied.

Dated: Washington, D. C.
July 9, 1935.

[Seal] [Signed]J. RRUSSELL LEECH
Member. [141]

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United States Board of Tax Appeals

Docket No. 47516

DOUGLAS L. EDMONDS, Administrator, ESTATE OF JOHN W. MITCHELL, Deceased,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket Nos. 66584, 70861

DOUGLAS L. EDMONDS, Administrator, ESTATE OF ADINA MITCHELL, Deceased,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Respondent having, under Rule 60, filed a notice of settlement of the tax liabilities of the petitioners

in these consolidated proceedings as in accord with the Findings of Fact and Opinion of the Board, promulgated December 28, 1934, and said notice of settlement having come on in due course for hearing July 24, 1935, at Washington, D. C. and petitioner having failed to contest the correctness of the proposed redetermination of the deficiency as computed by respondent and the same appearing to be in accord with the Opinion of the Board and correct, it is

ORDERED AND DECIDED that under Docket No. 47516, Douglas L. Edmonds, Administrator of the Estate of John W. Mitchell, deceased, there is a deficiency for the calendar year 1924 of $4,048.04, and for the period January 1 to July 2, 1925, a deficiency of $10,241.86; that under Docket No. 66584, Douglas L. Edmonds, Administrator of the Estate of Adina Mitchell, deceased, [142] there is for the year 1926 a deficiency of $5,032.09 and penalty of $1,258.02; for the calendar year 1927 there is a deficiency of $3,452.89 and penalty of $863.22 and for the calendar year 1928 a deficiency of $4,420.80 and penalty of $1,105.20; under Docket No. 70861, Douglas L. Edmonds, Administrator, de Bonis non, Estate of Adina Mitchell, deceased, there is for the calendar year 1925, a deficiency of $15,084.08 and penalty of $3,771.02.

Enter:

[Seal] [Signed] J. RUSSELL LEECH
Member.

[Endorsed]: Entered: Jul 29 1935. [143]

[Title of Court and Cause.—Docket Nos. 66584, 70861.]

STIPULATION AS TO VENUE.

It is hereby stipulated and agreed by and between the parties to the above entitled proceeding, through their respective counsel of record, that the decision of the United States Board of Tax Appeals, rendered and entered on the 29th day of July, 1935 in the above entitled cases, may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit.

This stipulation as to venue is executed pursuant to the provisions of Section 519 of the Revenue Act of 1934, amending Section 1002 of the Revenue Act of 1926.

LLEWELLYN A. LUCE
937 Munsey Building
Washington, D. C.
Counsel for Petitioner

FRANK J. WIDEMAN
Assistant Attorney General
Counsel for Respondent

[Endorsed]: Filed Oct. 18, 1935. [144]

[Title of Court and Cause.—Docket Nos. 47516, 66584, 70861.]

## PETITION FOR REVIEW TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now Douglas L. Edmonds, Administrator of the Estates of John W. Mitchell, deceased, and Adina Mitchell, deceased, by his attorneys, Claude I. Parker, Ralph W. Smith and Llewellyn A. Luce and respectfully shows:

I.

The petitioner on review (hereinafter referred to as the [145] petitioner) is the duly appointed, qualified and acting administrator of the Estate of John W. Mitchell, deceased, and of the Estate of Adina Mitchell, deceased. The petitioner resides in Los Angeles, California, and maintains a business address at 808 Bank of America Building in that City. The respondent on review (hereinafter referred to as the Commissioner) in the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

The decedent, John W. Mitchell, died on July 2, 1925, and his wife, Adina Mitchell, was duly appointed and qualified as the executrix of his estate. Adina Mitchell died, a resident of the County of San Diego, State of California, on the 20th day of April, 1931. Thereafter the petitioner was duly appointed administrator de bonis non of the Estate of John

W. Mitchell, deceased, and of the Estate of Adina Mitchell, deceased.

After the death of John W. Mitchell, Adina Mitchell, as executrix of the said decedent's estate, duly filed a Federal income tax return for the decedent for the period January 1st, 1925 to July 2, 1925. Adina Mitchell, as executrix of her deceased husband's estate, filed Federal income tax returns for the Estate of John W. Mitchell, deceased, for the period July 2, 1925 to January 1st, 1926, and for the calendar years 1926, 1927 and 1928. All of said returns were filed by the executrix, Adina Mitchell with the U. S. Collector of Internal Revenue for the Sixth District of California. The office of said Collector is located at Los Angeles, California, within the judicial circuit of the United States Circuit Court of Appeals for the Ninth *District.* [146]

Adina Mitchell did not herself file a separate individual Federal income tax return for the years 1925, 1926, 1927 and 1928. During 1930, without her knowledge or consent so-called delinquent returns for the period July 2, 1925 to January 1st, 1926 and for the years 1926 and 1927 were prepared for Adina Mitchell by a Deputy Collector of Internal Revenue, signed by him for her, and filed with the said Collector of Internal Revenue for the Sixth District of California at Los Angeles, California, on February 7, 1930. For the year 1928, without the knowledge or consent of Adina Mitchell a so-called delinquent return was prepared for her by a Deputy Collector of Internal Revenue, signed for her by him and filed with the Collector of Internal Revenue for the Sixth District of California on November 4. 1930.

It has been stipulated by and between the parties to this proceeding through their respective counsel of record, that the decision of the United States Board of Tax Appeals rendered and entered on July 29, 1935, under Board of Tax Appeals Docket Nos. 66584 and 70861 (involving the period from July 2, 1925 to January 1st, 1926 and the years 1926, 1927 and 1928) may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit.

II.

The Commissioner determined a deficiency in Federal income tax against the decedent, John W. Mitchell, in the amount of $11,270.77 for the period from January 1, 1925 to July 2, 1925, and on December 20, 1929, mailed, by registered mail, a notice of said deficiency to Adina Mitchell, executrix of the Estate of John [147] W. Mitchell. Thereafter the executrix duly filed with the United States Board of Tax Appeals, within sixty days from the date of said notice of deficiency, her petition appealing from said notice of deficiency. The appeal was given Docket No. 47516 by the Board and the Commissioner duly filed his answer. Thereafter Adina Mitchell died and this petitioner by agreement of the parties was substituted as party petitioner.

The Commissioner determined the following deficiencies and penalties against Adina Mitchell individually:

For the period July 2, 1925 to January 1, 1926, $5,669.58 with a penalty of $1,417.39; year 1926,

$4,095.80, with a penalty of $1,023.95; year 1927, $3,623.49, with a penalty of $905.87; year 1928, $4,551.08, with a penalty of $1,137.33.

On April 16, 1932, the Commissioner sent to Adina Mitchell by registered mail, a notice of said deficiencies. Adina Mitchell had died on April 20, 1931. The petitioner, as administrator of her estate, duly filed with the United States Board of Tax Appeals, within sixty days from the date of the notice of deficiency, his petition appealing from said notice of deficiency. The appeal was given Docket No. 66584 and an answer was duly filed by the Commissioner.

The Commissioner further determined a deficiency of $17,600.17 with a penalty of $4,400.04 against the decedent, Adina Mitchell, for the year 1925. Said deficiency included the deficiency of $5,669.58 for the period from July 2, 1925 to January 1, 1926, and penalty of $1,417.39 which had theretofore been proposed against [148] Adina Mitchell in the Commissioner's notice of deficiency, dated April 6, 1932 under Board of Tax Appeals Docket No. 66584. The Commissioner, by registered mail, under date of February 4, 1933, sent to the Estate of Adina Mitchell, a notice of the deficiency of $17,600.17, with penalty of $4,400.04 for the year 1925. Thereafter the petitioner duly filed with the United States Board of Tax Appeals within sixty days from the date of the notice of deficiency, his petition appealing from said notice of deficiency. The appeal was given Docket No. 70861 by the Board and the Commissioner thereafter filed his answer.

The three appeals bearing Board of Tax Appeals Docket Nos. 47516, 66584 and 70861 were by agreement of the parties consolidated for hearing and decision and came on for hearing before the Board in Long Beach, California, on the 2nd day of October, 1933.

On December 28, 1934, after the hearing of said appeals, the United States Board of Tax Appeals promulgated its findings of fact and opinion and on July 29, 1935, the said Board entered its final decision and order of redetermination in said appeals, wherein and whereby said Board ordered and decided as follows:

"That under Docket No. 47516, Douglas L. Edmonds, Administrator of the Estate of John W. Mitchell, deceased, there is a deficiency for the calendar year 1924 of $4,048.04, and for the period January 1 to July 2, 1925, a deficiency of $10,241.85; that under Docket No. 66584, Douglas L. Edmonds, Administrator of the Estate of Adina Mitchell, deceased, there is for the year 1926 a deficiency of [149] $5,032.09 and penalty of $1,258.02; for the calendar year 1927 there is a deficiency of $3,452.89 and penalty of $863.22 and for the calendar year 1928 a deficiency of $4,420.80 and penalty of $1,105.20; under Docket No. 70861, Douglas L. Edmonds, Administrator, de bonis non, Estate of Adina Mitchell, deceased, there is for the calendar year 1925, a deficiency of $15,084.08 and penalty of $3,771.02."

III.

The deficiencies involved arose and resulted principally from the determination of the Commissioner that on the date of the death of John W. Mitchell, July 2, 1925, the decedent and his wife, Adina Mitchell, held certain real and personal property as joint tenants. The Commissioner determined that for the period from January 1, 1925 to July 2, 1925, one-half of the income from said real and personal properties was taxable to Adina Mitchell as a joint tenant. The Commissioner further determined that the entire income from said properties was taxable to Adina Mitchell, as surviving joint tenant for the period from July 2, 1925 (date of death of John W. Mitchell) to January 1, 1926 and for the years 1926, 1927 and 1928.

John W. Mitchell and Adina Mitchell were married in Los Angeles, California, during the year 1888. By the year 1921 Mr. Mitchell had acquired several parcels of real property which were, during the years 1921 and 1922 conveyed by Mr. Mitchell in trust, to the Title Guarantee and Trust Company of Los Angeles, California, as security for loans to Mr. Mitchell to pay his indebted- [150] ness to the Pacific Southwest Trust and Savings Bank of Los Angeles, California, which bank had loaned Mr. Mitchell large sums of money prior to the year 1921.

In the year 1923 Mr. Mitchell authorized the Title Guarantee and Trust Company to sell all of the Cahuenga acreage, title to which was conveyed to F. A. Hartwell in two separate parcels, the first of 115

acres in consideration of the sum of $345,000.00, of which $50,000.00 was paid in cash with a note for $295,000.00, secured by a deed of trust, evidencing the balance; and the second parcel of 20 acres in consideration of the sum of $110,000.00, of which $20,000.00 was paid in cash with a note for $9,000.00, secured by a deed of trust evidencing the balance. Each of these notes was payable to John W. Mitchell.

The Los Angeles Stone Company also purchased a parcel of real estate for which it gave its note, payable to John W. Mitchell.

As of April 1, 1924, the Title Guarantee and Trust Company held title to all of the real estate previously conveyed to it in trust, except the parcels conveyed to F. A. Hartwell and the Los Angeles Stone Company. Also, as of April 1, 1924, the Title Guarantee and Trust Company held the two notes from Hartwell (payable to John W. Mitchell) and the note from the Los Angeles Stone Company (payable to John W. Mitchell) as security for loans made by the Title Guarantee and Trust Company to John W. Mitchell.

On April 1, 1924, the Title Guarantee and Trust Company issued a Declaration of Trust, numbered 822-B, declaring that it held certain assets in trust for John W. Mitchell and his wife as [151] joint tenants, with right of survivorship, and confirming and reasserting the assignment to the Title Guarantee and Trust Company of the notes of the Hartwell and Los Angeles Stone Company, as security

for the indebtedness of John W. Mitchell to said Title Guarantee and Trust Company.

Upon the death of John W. Mitchell on July 2, 925, Adina Mitchell was duly appointed executrix of his estate. She filed a Federal Estate tax return for the Estate of John W. Mitchell and included therein as part of the corpus of said estate, subject to Federal Estate tax, the notes of Mr. Hartwell, payable to John W. Mitchell, the note of the Los Angeles Stone Company, and the value of the real estate held in trust by the Title Guarantee and Trust Company. There was some disagreement between the Commissioner and the executrix as to the amount of estate tax due from the estate of John W. Mitchell; an appeal was taken to the United States Board of Tax Appeals by the executrix, and the matter was finally closed by decision of the Board pursuant to a stipulation executed by the Commissioner and the executrix.

The executrix duly filed a Federal income tax return for the decedent, John W. Mitchell, for the period January 1 to July 2, 1925. The executrix also duly filed a Federal income tax return for the estate of John W. Mitchell for the period from July 2, 1925 to January 1, 1926, and for the calendar years 1926, 1927 and 1928.

The executrix, Adina Mitchell, did not file a personal income tax return for herself for the period July 2, 1925 to January 1, 1926, or for the years 1926, 1927 and 1928. She regarded the income from [152] the real and personal property held in trust

by the Title Guarantee and Trust Company as the income of the Estate of John W. Mitchell, deceased, and did not regard any of such income as her individual property or income.

Without the knowledge or consent of Adina Mitchell, a Deputy Collector at Los Angeles, California, prepared and signed so-called delinquent returns for Adina Mitchell for the period July 2, 1925 to January 1, 1926 and for the years 1926, 1927 and 1928.

The Commissioner approved the said delinquent returns filed by said Deputy Collector and determined that for the period from January 1 to July 2, 1925, one-half of the income from the real and personal property held in trust by the Title Guarantee & Trust Company constituted the individual taxable income of Adina Mitchell.

The Commissioner further determined that for the period from July 2, 1925 to January 1, 1926, and for the calendar years 1926, 1927 and 1928, all of the income from the real and personal property held in trust by the Title Guarantee & Trust Company constituted the individual income of Adina Mitchell and not the income of the estate of John W. Mitchell.

The Commissioner further determined that the payments during the years 1925, 1926, 1927 and 1928 on the principal of the Hartwell and Los Angeles Stone Company notes constituted income to Adina Mitchell even though the principal of said notes had been included as corpus of the estate of John

W. Mitchell, deceased, in the Federal estate tax return of the said estate and Federal estate tax paid thereon by the estate with the approval of said Commission- [153] er. The Commissioner based his determination upon the ground that the Declaration of Trust issued on April 1, 1924, by the Title Guarantee & Trust Company of Los Angeles, California, created a joint tenancy and that the entire income from the properties held in trust by said Title Guarantee & Trust Company was taxable to Adina Mitchell as surviving joint tenant.

The Commissioner further determined that penalties of 25 per cent of the deficiencies proposed should be assessed against Adina Mitchell for the period from July 2, 1925 to January 1, 1926, and for the years 1926, 1927 and 1928, because of her failure to file individual income tax returns for said years, even though she had, as executrix, filed an estate income tax return for all of said years on the theory that the entire income from the properties in question constituted the income of the estate of John W. Mitchell, deceased, and not the individual income of Adina Mitchell.

The petitioner on Review contended before the Board as follows:

1. That as of July 2, 1925, the real estate and personal property held in trust by the Title Guarantee & Trust Company of Los Angeles, California, was the individual property of John W. Mitchell.

2. That the income from said real and personal property was taxable to John W. Mitchell individually for the period January 1, 1925 to July 2,

1925, and further that the income from said property, both real and personal, after the date of John W. Mitchell's death on July 2, 1925, was taxable income to the estate [154] of John W. Mitchell, as reported in the Federal income tax returns of said estate for the period from July 2, 1925 to January 1, 1926 and the years 1926, 1927 and 1928.

3. That the real and personal property held in trust by the Title Guarantee & Trust Company of Los Angeles, California, as of July 2, 1925, was not joint tenancy property.

4. That the income from said real and personal property for the period from January 1, 1925 to July 2, 1925, was not taxable in equal shares to John W. Mitchell and Adina Mitchell as joint tenants.

5. That the income from said property, both real and personal, was not taxable to Adina Mitchell individually for the period from July 2, 1925 to January 1, 1926 and for the years 1926, 1927 and 1928, inasmuch as Adina Mitchell was not a surviving joint tenant.

6. That the Declaration of Trust issued by the Title Guarantee & Trust Company on April 1, 1924, designated as No. 822-B, did not create a joint tenancy and that the Commissioner erred in determining that said Declaration of Trust was sufficient to create a joint tenancy.

7. That in any event by the clear and unambiguous language of said Declaration of Trust, dated April 1, 1924, the personal property consisting of the Hartwell notes and the note of the Los Angeles

Stone Company, was pledged as security for the personal debts of John W. Mitchell and was not placed in joint tenancy by said Declaration of Trust and further that said Declaration of Trust [155] was insufficient to create a joint tenancy in the said personal property consisting of the Hartwell notes and the Los Angeles Stone Company note.

8. That the payments on the principal of the Hartwell and Los Angeles Stone Company notes constituted a return of capital and not income to the decedent, Adina Mitchell.

9. That the principal and any accrued interest on the Hartlett notes and Los Angeles Stone Company note constituted corpus of the estate of John W. Mitchell; had been returned in the Federal estate tax return of the estate of John W. Mitchell, deceased, and could not be both corpus of the estate of John W. Mitchell and income to the decedent, Adina Mitchell.

10. That if a payment on the principal of said notes constituted income to the decedent, Adina Mitchell, then, certainly, said notes were not a part of the corpus of the estate of John W. Mitchell and the estate tax paid on said notes as part of the corpus of the estate of John W. Mitchell should be offset against the income tax deficiencies proposed against the decedent, Adina Mitchell, for the period July 2, 1925 to January 1st, 1926 and the years 1926, 1927 and 1928.

11. That any profit derived from the sale of any of the real or personal property held in trust by the

Title Guarantee & Trust Company of Los Angeles should be measured by the fair market value of said property as of July 2, 1925, the date of the death of John W. Mitchell; that the respondent erred in attempting to [156] use as the cost basis to Adina Mitchell the March 1, 1913, value of the property sold by the Title Guarantee & Trust Company rather than the value of such property as of July 2, 1925; that the decedent, Adina Mitchell, did not derive any taxable income from the Hartwell and Los Angeles Stone Company notes until such a time as the income from said notes exceeded the fair market value of said notes on the date of the death of the decedent, John W. Mitchll.

12. That the assessment of any deficiency against the petitioner was barred by the statute of limitations and that respondent erred in attempting to assess penalties against the decedent, Adina Mitchell, for failure to return the income here in question in a separate individual return when she had already returned such income in the Federal income tax return filed by her for the estate of John W. Mitchell, deceased, for the period July 2, 1925 to January 1, 1926, and the years 1926, 1927 and 1928.

13. That the petitioner and the Commissioner having agreed that the real and personal property held in trust by the Title Guarantee & Trust Company as of July 2, 1925, constituted corpus of the estate of John W. Mitchell and the Board having rendered a decision under Docket No. 36231 reflecting this agreement, the question is res adjudicata,

and the Commissioner is estopped from taxing payments on the principal sums of said properties as income to Adina Mitchell.

The United States Board of Tax Appeals sustained the determination of the Commissioner and decided each of the aforemen- [157] tioned contentions against the petitioner.

IV.

The petitioner being aggrieved by the said decision and final order of said United States Board of Tax Appeals, desires a review thereof in accordance with the provisions of the Revenue Acts of 1926 and 1928, as amended by the Revenue Act of 1934, by the United States Circuit Court of Appeals for the Ninth Circuit, within which Circuit is located the office of the Collector of Internal Revenue with whom the income tax returns here involved were filed.

V.

Petitioner says that in the record and proceedings before the United States Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the said United States Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the petitioner, and petitioner assigns the following errors and each of them which he avers occurred in said record, proceedings, decision and final order of redetermination and upon which he relies to reverse the said decision and final order of redetermination so rendered and

entered by the said United States Board of Tax Appeals, to-wit:

1. The Board of Tax Appeals erred in holding that as of July 2, 1925, the real and personal property held in trust by the Title Guarantee & Trust Company of Los Angeles, California, was joint tenancy property rather than the individual property of the decedent, John W. Mitchell. [158]

2. The Board of Tax Appeals erred in holding and deciding that the income from the real and personal property held in trust by the Title Guarantee & Trust Company of Los Angeles, California, was taxable to the decedent, Adina Mitchell, as surviving joint tenant for the period from July 2, 1925 to January 1, 1926 and the years 1926, 1927 and 1928.

3. The Board of Tax Appeals erred in holding and deciding that the Declaration of Trust issued by the Title Guarantee & Trust Company of Los Angeles, California, on April 1, 1924, designated as No. 822-B was under the laws of the State of California sufficient to create a joint tenancy with right of survivorship.

4. The Board of Tax Appeals erred by failing to hold and decide that said Declaration of Trust issued by the Title Guarantee & Trust Company on April 1, 1924, was insufficient to create a joint tenancy with respect to the real and personal property held in trust by said Title Guarantee & Trust Company.

5. The Board of Tax Appeals erred in any event by failing to hold and decide that the said Decla-

ration of Trust issued on April 1, 1924, was insufficient to create a joint tenancy with right of survivorship in the Hartwell and Los Angeles Stone Company notes which were definitely pledged with the said Trust Company to secure the individual indebtedness of the decedent, John W. Mitchell.

6. The Board of Tax Appeals erred in failing to hold and decide that the income from the real and personal property held in trust by the Title Guarantee & Trust Company constituted a return of capital to the decedent, Adina Mitchell, for the period July 2, 1925 to January 1, 1926, and the years 1926, 1927 and 1928, rather [159] than income taxable to said decedent.

7. The Board of Tax Appeals erred by failing to hold and decide that the cost basis of the real estate sold after July 2, 1925, by the Title Guarantee & Trust Company was the fair market value thereof as of July 2, 1925, rather than March 1, 1913.

8. The Board of Tax Appeals erred by failing to hold and decide that the income from the real and personal property held in trust by the Title Guarantee & Trust Company was income taxable to the estate of John W. Mitchell, deceased, for the period from July 2, 1925 to January 1, 1926, and for the years 1926, 1927 and 1928.

9. The Board of Tax Appeals erred by failing to hold and decide that the Hartwell and Los Angeles Stone Company notes constituted a portion of the corpus of the estate of John W. Mitchell, deceased,

and accordingly that payments thereon were not taxable as income to the decedent, Adina Mitchell, for the years 1925, 1926, 1927 and 1928.

10. The Board of Tax Appeals erred by, in effect, holding and deciding that the principal of the Hartwell and Los Angeles Stone Company notes constituted both corpus of the estate of John W. Mitchell, deceased, and taxable income to the decedent, Adina Mitchell, when payments were made thereon during the years 1925, 1926, 1927 and 1928.

11. The Board of Tax Appeals in any event erred by holding and deciding that the Federal estate tax paid on the principal of the Hartwell and Los Angeles Stone Company notes by the estate of [160] John W. Mitchell should not be set off against the income tax deficiency proposed against Adina Mitchell for the years here under review.

12. The Board of Tax Appeals erred in failing to hold and decide that the deficiencies proposed for assessment against the petitioner for all the taxable periods and years here involved were barred by the statute of limitations under the Revenue Acts of 1926 and 1928.

13. The Board of Tax Appeals erred in holding and deciding that penalties should be assessed against Adina Mitchell for her failure to file a separate individual income tax return for the period from July 2, 1925 to January 1, 1926 and the years 1926, 1927 and 1928.

14. The Board of Tax Appeals erred by failing to hold and decide that inasmuch as the income here

involved had been reported in the estate tax returns of the Estate of John W. Mitchell, deceased, filed by Adina Mitchell as executrix, no penalty should be assessed against Adina Mitchell individually for failure to report said income in the individual income tax return filed by her.

15. The Board of Tax Appeals erred by failing to hold and decide that the respondent erred in attempting to exact a second income tax from Adina Mitchell individually on income which had theretofore been reported by her as executrix of the estate of John W. Mitchell, deceased, and Federal income tax paid thereon.

16. The Board of Tax Appeals erred by, in effect, holding that the respondent could accept three separate taxes on the same [161] property, that is, the Federal estate tax, on the theory that the real and personal property here involved was corpus of the estate of John W. Mitchell; an income tax paid by the estate of said John W. Mitchell, on the income from said property and a tax from Adina Mitchell individually on income reported by her as executrix in the Federal tax returns of the estate of John W. Mitchell.

17. The Board of Tax Appeals erred by failing to hold and decide that the March 1, 1913, value of the Santa Monica Beach property sold by John W. Mitchell prior to his death was $97,338.20 rather than $14,521.39. The March 1, 1913, value of said property was incorrectly stated in the stipulation of facts filed with the Board and the attention of the Board and respondent's representatives was called

to this fact in the brief filed before the Board by petitioner on review.

18. The Board of Tax Appeals erred in holding and deciding that one-half of the income from the property held in trust by the Title Guarantee & Trust Company was taxable to the decedent, Adina Mitchell, for the period January 1, 1925 to July 2, 1925, under the theory that said property was held by John W. Mitchell and his wife, Adina Mitchell, as joint tenants during said period.

19. The Board of Tax Appeals erred in any event by determining penalties against the petitioner as administrator of the estate of Adina Mitchell, deceased, inasmuch as any possible right of respondent to such penalties passed with the death of said Adina Mitchell.

20. The Board of Tax Appeals erred by failing to hold and [162] decide that inasmuch as the respondent and petitioner had agreed that the real and personal property here involved constituted corpus of the Estate of John W. Mitchell, deceased, and the Board having reflected such agreement in a decision under Docket No. 36231, the question is res adjudicata, and the Commissioner is estopped from claiming that payments on the principal of said properties is taxable as income to the decedent, Adina Mitchell.

21. The Board of Tax Appeals erred in not redetermining the deficiencies herein involved in favor of the petitioner against the Commissioner.

WHEREFORE, the petitioner prays that the decision of the United States Board of Tax Appeals entered herein against him be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit and that a transcript of the record be prepared in accordance with the law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

CLAUDE I. PARKER
RALPH W. SMITH
DOUGLAS L. EDMONDS
808 Bank of America Building
Los Angeles California
LLEWELLYN A. LUCE
937 Munsey Building
Washington, D. C.
Counsel for Petitioner on Review. [163]

City of Washington,
District of Columbia.

LLEWELLYN A. LUCE, being first duly sworn, says:

That he is one of the attorneys of record for the above named petitioner and as such is duly authorized to verify the above and foregoing petition for review to the United States Circuit Court of Appeals for the Ninth Circuit; that he has read said petition for review and is familiar with the state-

ments therein contained and that the facts therein stated are true, except such facts as may be stated to be on information and those facts he believes to be true.

LLEWELLYN A. LUCE

Subscribed and sworn to before me this 18th day of October, 1935.

(Signed) ELSIE P. DAMERON
Notary Public

[Endorsed]: Filed Oct. 18, 1936. [164]

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[Title of Court and Cause.—Docket Nos. 47516, 66584, 70861.]

NOTICE.

TO:
Hon. Robert H. Jackson,
Assistant General Counsel,
Bureau of Internal Revenue,
Washington, D. C.
Counsel for Respondent on Review.

Notice is hereby given you that Douglas L. Edmonds, Administrator of the Estate of John W. Mitchell, Deceased, and Administrator of the Estate of Adina Mitchell, Deceased, petitioner on review in the above entitled proceedings, did on the 18th day of October, A. D., 1935, file with the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the deci-

sion rendered by said Board of Tax Appeals [165] in said proceeding, a copy of which said petition for review, as filed, is herewith served upon you.

LLEWELLYN A. LUCE,
Counsel for Petitioner on Review

Service of the foregoing Notice and of a copy of the petition for review mentioned in said Notice is acknowledged this 18th day of October, A. D., 1935.

ROBERT H. JACKSON,
Counsel for Respondent on Review. [166]

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[Title of Court and Cause.—Docket Nos. 47516, 66584, 70861.]

PRAECIPE.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit heretofore filed by the petitioner on review:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board, including—
   (a) Petition under Docket 47516, including annexed copy of the Commissioner's notice of deficiency.
   (b) Answer filed by Respondent in Docket 47516.
   (c) Petition filed with the Board under Docket 66584. [167]
   (d) Respondent's answer and amended answer filed under Docket 66584.
   (e) Petitioner's reply to Respondent's amended answer filed under Docket 66584.
   (f) Petition filed with the Board under Docket 70861.
   (g) Answer filed by Respondent under Docket 70861.

3. Stipulation of facts, with Exhibits A, B, C, D, E and F, attached thereto, filed with the Board at the date of the hearing of this cause on October 2, 1933.

4. Copy of letter dated October 10, 1933, signed by Ralph W. Smith and addressed to F. E. Collins, representative Special Advisory Committee of the Commissioner's office at Los Angeles, California; also copy of letter dated October 20, 1933, from said F. E. Collins to said Ralph W. Smith. Said documents were attached to petitioner's brief, filed with the Board on January 10, 1934.

5. Opinion of the Board promulgated December 28, 1934.

6. Commissioner's Notice of Settlement, filed with the Board on January 29, 1935.

7. Motion for Reconsideration and Rehearing, filed by Petitioner on May 20, 1935.

8. Memorandum and Order of the Board entered July 9, 1935.

9. Decision and final Order of the Board entered July 29, 1935.

10. Stipulation as to venue filed with the Board on October 18, 1935.

11. Notice of filing Petition for review filed with the Board on October 18, 1935.

12. Petition for review filed October 18, 1935.

13. This Praecipe. [168]

CLAUDE I. PARKER
RALPH W. SMITH
DOUGLAS L. EDMONDS
808 Bank of America Bldg.,
Los Angeles, California.
LLEWELLYN A. LUCE,
937 Munsey Building,
Washington, D. C.
Counsel for Petitioner on Review.

Service of a copy of the within Praecipe is hereby admitted this 8th day of January, 1936.

HERMAN OLIPHANT,
General Counsel for the Department of the Treasury.

[Endorsed]: Filed Jan. 8, 1936. [169]

[Title of Court and Cause.—Docket Uos. 47516, 66584, 70861.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 169, inclusive contain and are a true copy of the transcript of record papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 6th day of February, 1936.

[Seal] B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

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[Endorsed]: No. 8129. United States Circuit Court of Appeals for the Ninth Circuit. Douglas L. Edmonds, Administrator, Estate of John W. Mitchell, Deceased, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Douglas L. Edmonds, Administrator, Estate of Adina Mitchell, Deceased, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed February 17, 1936.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

# No. 8129

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

DOUGLAS L. EDMONDS, Administrator, Estate of John W. Mitchell, Deceased,
*Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

DOUGLAS L. EDMONDS, Administrator, Estate of Adina Mitchell, Deceased,
*Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

**On Petition for Review of Decision of the United States Board of Tax Appeals.**

## BRIEF FOR PETITIONERS.



CLAUDE I. PARKER,
RALPH W. SMITH,
Bank of America Building, Los Angeles, California,
LLEWELLYN A. LUCE,
Munsey Building, Washington, D. C.,
*Counsel for Petitioners on Review.*

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

## Subject Index

## Table of Authorities Cited

No. 8129

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

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DOUGLAS L. EDMONDS, Administrator, Estate of John W. Mitchell, Deceased,
*Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

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DOUGLAS L. EDMONDS, Administrator, Estate of Adina Mitchell, Deceased,
*Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

---

**On Petition for Review of Decision of the United States Board of Tax Appeals.**

## BRIEF FOR PETITIONERS.

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### INTRODUCTION.

These are appeals from the decision of the United States Board of Tax Appeals entered July 29, 1935 (R. 199-200) determining that the following deficiencies in Federal income taxes were due and owing from these petitioners:

Douglas L. Edmonds, Administrator of the Estate of John W. Mitchell, Deceased:

A deficiency of $4,048.04 for the calendar year 1924 and a deficiency of $10,241.86 for the period from January 1, 1925 to July 2, 1925 (B. T. A. Docket No. 47516).

Douglas L. Edmonds, Administrator of the Estate of Adina Mitchell, Deceased:

A deficiency of $5,032.09 and a penalty of $1,258.02 for the calendar year 1926; a deficiency of $3,452.89 and a penalty of $863.22 for the calendar year 1927; a deficiency of $4,420.80 and a penalty of $1,105.20 for the calendar year 1928 (B. T. A. Docket No. 66584); a deficiency of $15,084.08 and a penalty of $3,771.02 for the calendar year 1925 (B. T. A. Docket No. 70861).

The only previous opinions in these cases are the opinion of the Board of Tax Appeals (R. 170-178) reported in 31 B. T. A., page 962 and the unpublished memorandum and order of the Board entered on July 9, 1935, denying petitioners' motion for rehearing and reconsideration (R. 196-199).

The cases are brought to this Court by petition for review filed October 18, 1935 (R. 202-223) pursuant to the provisions of sections 1001-1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

## PRELIMINARY STATEMENT.

The Commissioner of Internal Revenue based his determination in this case upon the ground that a certain Declaration of Trust executed on April 1, 1924, by the Title Guarantee and Trust Company of Los Angeles, California, created a joint tenancy and that the entire income from the properties held in trust by said Title Guarantee and Trust Company was taxable to Adina Mitchell as surviving joint tenant. The Board of Tax Appeals upheld the Commissioner's determination.

For the sake of clearness a brief statement of certain outstanding facts is necessary before stating the questions involved in this appeal.

John W. Mitchell and Adina Mitchell were married in Los Angeles, California, during the year 1888. By the year 1921 Mr. Mitchell had acquired several parcels of real property which were, during the years 1921 and 1922 conveyed by Mr. Mitchell in trust, to the Title Guarantee and Trust Company of Los Angeles, California, as security for loans to Mr. Mitchell to pay his indebtedness to the Pacific Southwest Trust and Savings Bank of Los Angeles, California, which bank had loaned Mr. Mitchell large sums of money prior to the year 1921.

In the year 1923 Mr. Mitchell authorized the Title Guarantee and Trust Company to sell all of the Cahuenga acreage, title to which was conveyed to F. A. Hartwell in two separate parcels, the first of 115 acres in consideration of the sum of $345,000.00 of which $50,000.00 was paid in cash with a note for $295,000.00,

secured by a deed of trust, evidencing the balance; and the second parcel of 20 acres in consideration of the sum of $110,000.00, of which $20,000.00 was paid in cash with a note for $9,000.00, secured by a deed of trust evidencing the balance. Each of these notes was payable to John W. Mitchell.

The Los Angeles Stone Company also purchased a parcel of real estate for which it gave its note, payable to John W. Mitchell.

As of April 1, 1924, the Title Guarantee and Trust Company held title to all of the real estate previously conveyed to it in trust, except the parcels conveyed to F. A. Hartwell and the Los Angeles Stone Company. Also, as of April 1, 1924, the Title Guarantee and Trust Company held the two notes from Hartwell (payable to John W. Mitchell) as security for loans made by the Title Guarantee and Trust Company to John W. Mitchell.

On April 1, 1924, the Title Guarantee and Trust Company issued a Declaration of Trust, numbered 822-B, declaring that it held certain assets in trust for John W. Mitchell and his wife and confirming and reasserting the assignment to the Title Guarantee and Trust Company of the notes of the Hartwell and Los Angeles Stone Company, as security for the indebtedness of John W. Mitchell to said Title Guarantee and Trust Company.

Upon the death of John W. Mitchell on July 2, 1925, Adina Mitchell was duly appointed executrix of his estate. She filed a Federal Estate tax return for the Estate of John W. Mitchell and included therein

as part of the corpus of said estate, subject to Federal Estate tax, the notes of Mr. Hartwell, payable to John W. Mitchell, the note of the Los Angeles Stone Company, and the value of the real estate held in trust by the Title Guarantee and Trust Company. There was some disagreement between the Commissioner and the executrix as to the amount of estate tax due from the estate of John W. Mitchell; an appeal was taken to the United States Board of Tax Appeals by the executrix, and the matter was finally closed by decision of the Board pursuant to a stipulation executed by the Commissioner and the executrix.

The executrix duly filed a Federal income tax return for the decedent, John W. Mitchell, for the period January 1 to July 2, 1925. The executrix also duly filed a Federal income tax return for the estate of John W. Mitchell for the period from July 2, 1925 to January 1, 1926, and for the calendar years 1926, 1927 and 1928.

The executrix, Adina Mitchell, did not file a personal income tax return for herself for the period of July 2, 1925 to January 1, 1926, or for the years 1926, 1927 and 1928. She regarded the income from the real and personal property held in trust by the Title Guarantee and Trust Company as the income of the Estate of John W. Mitchell, deceased, and did not regard any of such income as her individual property or income.

Without the knowledge or consent of Adina Mitchell, a Deputy Collector at Los Angeles, California, prepared and signed so-called delinquent returns for

Adina Mitchell for the period July 2, 1925 to January 1, 1926 and for the years 1926, 1927 and 1928.

The Commissioner approved the said delinquent returns filed by said Deputy Collector and determined that for the period from January 1 to July 2, 1925, one-half of the income from the real and personal property held in trust by the Title Guarantee and Trust Company constituted the individual taxable income of Adina Mitchell.

The Commissioner further determined that for the period from July 2, 1925 to January 1, 1926, and for the calendar years 1926, 1927 and 1928, all of the income from the real and personal property held in trust by the Title Guarantee and Trust Company constituted the individual income of Adina Mitchell and not the income of the estate of John W. Mitchell.

The Commissioner further determined that the payments during the years 1925, 1926, 1927 and 1928 on the principal of the Hartwell and Los Angeles Stone Company notes constituted income to Adina Mitchell even though the principal of said notes had been included as corpus of the estate of John W. Mitchell, deceased, in the Federal estate tax return of the said estate and Federal estate tax paid thereon by the estate with the aproval of said Commissioner.

The Commissioner further determined that penalties of 25 per cent of the deficiencies proposed should be assessed against Adina Mitchell for the period from July 2, 1925 to January 1, 1926 and for the years 1926, 1927 and 1928, because of her failure to file individual

income tax returns for said years, even though she had, as executrix, filed an estate income tax return for all of said years on the theory that the entire income from the properties in question constituted the income of the estate of John W. Mitchell, deceased, and not the individual income of Adina Mitchell.

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**QUESTIONS PRESENTED.**

I. Whether the Declaration of Trust executed on April 1, 1924, by the Title Guarantee and Trust Company of Los Angeles, California, created a joint tenancy.

II. Whether the income from the real and personal property held in trust by the Title Guarantee and Trust Company of Los Angeles, California, was taxable to John W. Mitchell individually for the period January 1, 1925 to July 2, 1925, and, further, whether the income from said property, both real and personal, after the death of John W. Mitchell on July 2, 1925 was taxable income to the estate of John W. Mitchell or to Adina Mitchell, his surviving joint tenant for the years 1925, 1926, 1927 and 1928.

III. Whether the personal property consisting of the Hartwell notes and the note of the Los Angeles Stone Company, pledged as security for the personal debts of John W. Mitchell was placed in joint tenancy by the said Declaration of Trust, dated April 1, 1924, and whether the said Declaration of Trust was sufficient to create a joint tenancy in the said personal property.

IV. Whether the notes and money here involved constituted corpus of the estate of John W. Mitchell rather than income taxable to Adina Mitchell.

V. The petitioner and the respondent having agreed that the properties here involved constituted corpus of the estate of John W. Mitchell, deceased, and the Board of Tax Appeals under Docket No. 36231 having rendered its decision based thereon, whether the question is res adjudicata, and the Commissioner is estopped from claiming that payments on the principal of said properties is taxable as income to the decedent.

VI. Whether the three promissory notes and the proceeds of the sale of property made after Mr. Mitchell's death can be taxed by the respondent both as corpus of his estate and also income to Adina Mitchell.

VII. Whether if Adina Mitchell is liable for income taxes on these properties the amount of estate tax assessed and paid on the same properties should be allowed as an offset against the income tax liability.

VIII. Whether there is any just and reasonable basis for assessing a penalty against a widow under the circumstances shown in this case.

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## ASSIGNMENT OF ERRORS.

1. The Board of Tax Appeals erred in holding that as of July 2, 1925, the real and personal property held in trust by the Title Guarantee and Trust Company of

## SPECIFICATIONS OF ERRORS.

The Board of Tax Appeals erred in deciding that by a certain declaration of trust executed by John W. Mitchell and Adina Mitchell, title to certain notes and real estate theretofore owned by John W. Mitchell passed to John W. Mitchell and Adina Mitchell, his wife, as joint tenants. (Assignments of Error 1, 3, 4, 5.)

The Board of Tax Appeals erred in deciding that the income realized after the death of John W. Mitchell from certain notes and real estate constituted a return of capital to Adina Mitchell rather than income taxable to her. (Assignments of Error 6, 7.)

The Board of Tax Appeals erred in failing to decide that the income realized after the death of John W. Mitchell from certain notes and real estate was income taxable to his estate and not taxable to Adina Mitchell, his widow. (Assignment of Error 8.)

The Board of Tax Appeals erred in deciding that the principal of certain promissory notes constituted both corpus of the Estate of John W. Mitchell and income taxable to Adina Mitchell, his widow. (Assignments of Error 9, 10, 20.)

The Board of Tax Appeals erred in deciding that a Federal estate tax paid on the principal of certain promissory notes should not be set off against an income tax deficiency proposed against Adina Mitchell upon the same property. (Assignment of Error 11.)

The Board of Tax Appeals erred in failing to decide that the deficiencies proposed to be assessed against the estates of both John W. Mitchell and Adina

Mitchell are barred by the statute of limitations under the Revenue Acts of 1926 and 1928. (Assignment of Error 12.)

The Board of Tax Appeals erred in deciding that although Adina Mitchell reported all property here in question as owned by the estate of her deceased husband, John W. Mitchell, and paid a Federal estate tax thereon, penalties should be assessed against her for her failure to file a separate tax return reporting the same property as income of herself. (Assignments of Error 13, 14.)

The Board of Tax Appeals erred in deciding that an income tax may be collected against Adina Mitchell upon the same property reported as income of the Estate of John W. Mitchell, deceased. (Assignments of Error 2, 15, 18.)

The Board of Tax Appeals erred in deciding that the Government is entitled to three taxes upon the same property. (Assignment of Error 16.)

The Board of Tax Appeals erred in basing its decision upon certain computations shown by the stipulation of facts to be erroneous. (Assignment of Error 17.)

The Board of Tax Appeals erred in deciding that penalties may be assessed against petitioner as administrator for the failure of his decedent to file an income tax return. (Assignment of Error 19.)

The Board of Tax Appeals erred in determining deficiencies against the petitioner. (Assignment of Error 21.)

Los Angeles, California, was joint tenancy property rather than the individual property of the decedent, John W. Mitchell.

2. The Board of Tax Appeals erred in holding and deciding that the income from the real and personal property held in trust by the Title Guarantee and Trust Company of Los Angeles, California, was taxable to the decedent, Adina Mitchell, as surviving joint tenant for the period from July 2, 1925 to January 1, 1926 and the years 1926, 1927 and 1928.

3. The Board of Tax Appeals erred in holding and deciding that the Declaration of Trust issued by the Title Guarantee and Trust Company of Los Angeles, California, on April 1, 1924, designated as No. 822-B was under the laws of the State of California sufficient to create a joint tenancy with right of survivorship.

4. The Board of Tax Appeals erred by failing to hold and decide that said Declaration of Trust issued by the Title Guarantee and Trust Company on April 1, 1924, was sufficient to create a joint tenancy with respect to the real and personal property held in trust by said Title Guarantee and Trust Company.

5. The Board of Tax Appeals erred in any event by failing to hold and decide that the said Declaration of Trust issued on April 1, 1924, was insufficient to create a joint tenancy with right of survivorship in the Hartwell and Los Angeles Stone Company notes which were definitely pledged with the said Trust Company to secure the individual indebtedness of the decedent, John W. Mitchell.

6. The Board of Tax Appeals erred in failing to hold and decide that the income from the real and personal property held in trust by the Title Guarantee and Trust Company constituted a return of capital to the decedent, Adina Mitchell, for the period July 2, 1925 to January 1, 1926, and the years 1926, 1927 and 1928, rather than income taxable to said decedent.

7. The Board of Tax Appeals erred by failing to hold and decide that the cost basis of the real estate sold after July 2, 1925, by the Title Guarantee and Trust Company was the fair market value thereof as of July 2, 1925, rather than March 1, 1913.

8. The Board of Tax Appeals erred by failing to hold and decide that the income from the real and personal property held in trust by the Title Guarantee and Trust Company was income taxable to the estate of John W. Mitchell, deceased, for the period from July 2, 1925 to January 1, 1926, and for the years 1926, 1927 and 1928.

9. The Board of Tax Appeals erred by failing to hold and decide that the Hartwell and Los Angeles Stone Company notes constituted a portion of the corpus of the estate of John W. Mitchell, deceased, and accordingly that payments thereon were not taxable as income to the decedent, Adina Mitchell, for the years 1925, 1926, 1927 and 1928.

10. The Board of Tax Appeals erred by, in effect, holding and deciding that the principal of the Hartwell and Los Angeles Stone Company notes constituted both corpus of the estate of John W. Mitchell, deceased, and taxable income to the decedent, Adina

Mitchell, when payments were made thereon during the years 1925, 1926, 1927 and 1928.

11. The Board of Tax Appeals in any event erred by holding and deciding that the Federal estate tax paid on the principal of the Hartwell and Los Angeles Stone Company notes by the estate of John W. Mitchell should not be set off against the income tax deficiency proposed against Adina Mitchell for the years here under review.

12. The Board of Tax Appeals erred in failing to hold and decide that the deficiencies proposed for assessment against the petitioner for all the taxable periods and years here involved were barred by the statute of limitations under the Revenue Acts of 1926 and 1928.

13. The Board of Tax Appeals erred in holding and deciding that penalties should be assessed against Adina Mitchell for her failure to file a separate individual income tax return for the period from July 2, 1925 to January 1, 1926 and the years 1926, 1927 and 1928.

14. The Board of Tax Appeals erred by failing to hold and decide that inasmuch as the income here involved had been reported in the estate tax returns of the Estate of John W. Mitchell, deceased, filed by Adina Mitchell as executrix, no penalty should be assessed against Adina Mitchell individually for failure to report said income in the individual income tax return filed by her.

15. The Board of Tax Appeals erred by failing to hold and decide that the respondent erred in attempt-

ing to exact a second income tax from Adina Mitchell individually on income which had heretofore been reported by her as executrix of the estate of John W. Mitchell, deceased, and Federal income tax paid thereon.

16. The Board of Tax Appeals erred by, in effect, holding that the respondent could accept three separate taxes on the same property, that is, the Federal estate tax, on the theory that the real and personal property here involved was corpus of the estate of John W. Mitchell; an income tax paid by the estate of said John W. Mitchell, on the income from said property and a tax from Adina Mitchell individually on income reported by her as executrix in the Federal tax returns of the estate of John W. Mitchell.

17. The Board of Tax Appeals erred by failing to hold and decide that the March 1, 1913, value of the Santa Monica Beach property sold by John W. Mitchell prior to his death was $97,338.20 rather than $14,521.39. The March 1, 1913, value of said property was incorrectly stated in the stipulation of facts filed with the Board and the attention of the Board and respondent's representatives was called to the fact in the brief filed before the Board by petitioner on review.

18. The Board of Tax Appeals erred in holding and deciding that one-half of the income from the property held in trust by the Title Guarantee & Trust Company was taxable to the decedent, Adina Mitchell, for the period January 1, 1925 to July 2, 1925, under the theory that said property was held by John W.

Mitchell and his wife, Adina Mitchell, as joint tenants during said period.

19. The Board of Tax Appeals erred in any event by determining penalties against the petitioner as administrator of the estate of Adina Mitchell, deceased, inasmuch as any possible right of respondent to such penalties passed with the death of said Adina Mitchell.

20. The Board of Tax Appeals erred by failing to hold and decide that inasmuch as the respondent and petitioner had agreed that the real and personal property here involved constituted corpus of the Estate of John W. Mitchell, deceased, and the Board having reflected such agreement in a decision under Docket No. 36231, the question is *res adjudicata,* and the Commissioner is estopped from claiming that payments on the principal of said properties is taxable as income to the decedent, Adina Mitchell.

21. The Board of Tax Appeals erred in not redetermining the deficiencies herein involved in favor of the petitioner against the Commissioner.

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**STATUTES INVOLVED.**

Revenue Act of 1926:

"Determination of Amount of Gain or Loss.

Sec. 202. (a) Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided

in subdivision (a) or (b) of section 204, and the loss shall be the excess of such basis over the amount realized.

* * * * * * *

"Basis for Determining Gain or Loss, Depletion and Depreciation.

Sec. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property.

* * * * * * *

"Gross Income Defied.

Sec. 213. For the purpose of this title, except as otherwise provided in section 233—

(a) The term 'gross income' includes gains, profits and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under

methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period."

Sections 111 and 113 of the Revenue Act of 1928 contain provisions similar to sections 202 and 204 of the Revenue Act of 1926. Section 22 of the Revenue Act of 1928 contains provisions similar to section 213 of the Revenue Act of 1926.

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**CALIFORNIA STATUTES INVOLVED.**

Section 683 of the Civil Code of California enacted during the year 1872 provides:

> "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants."

In 1929 section 683 of the Civil Code of California was amended by adding the language in italics:

> "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy *or by transfer from a sole owner to himself and others or from tenants in common to themselves,* or to themselves and others, when expressly declared in the transfer to be a joint tenancy or when granted or devised to executors or trustees as joint tenants. *No joint tenancy shall be created except as herein provided.*"

In 1931 the statute was again amended by dropping the language added in 1929 with the result that the section again stood in its original form.

In 1935 the provisions of the 1929 amendment were again restored.

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**STATEMENT OF FACTS.**

Three separate cases involving the claims of the government for income taxes of John W. Mitchell and Adina Mitchell, his wife, both now deceased, are presented upon this appeal. They are:

*Docket No. 47516.*

Taxes claimed from John W. Mitchell for the year 1924 and for 1925 until July 2, the date of his death.

*Docket No. 66584.*

Taxes claimed from Adina Mitchell from July 2, 1925 (the date of Mr. Mitchell's death) to and including the year 1928.

*Docket No. 70861.*

Taxes claimed from Adina Mitchell for the year 1925 (to July 2 as a joint tenant; thereafter as a surviving joint tenant).

The controversy concerns taxes claimed to have accrued by reason of the sale by John W. Mitchell of three parcels of real estate, each of substantial value. These sales were made in 1921 and 1922. Mr. Mitchell died July 2, 1925. Mrs. Adina Mitchell, his widow, was appointed executrix of his will and proceeded with the administration of his estate. In the course of these

proceedings she made a Federal estate tax return in which she included all property in controversy as property of the estate of her deceased husband. Certain deductions were made by her under the claim that the property was community property of herself and her deceased husband and that only one-half was subject to tax. The Government resisted this claim and in a proceeding before the Board of Tax Appeals (Docket No. 36321) a deficiency was assessed (R. 163) and the tax paid.

Notwithstanding that the Government assessed and collected an estate tax on all of the property returned by Mrs. Mitchell as belonging to her husband and administered upon in his estate, it has assessed Mrs. Mitchell individually for taxes alleged to be due from her as a joint owner with her husband of this same property before his death, and as the sole owner of it thereafter as a surviving joint tenant. Thus the Government seeks to tax the same property twice.

The consolidated cases were tried before the Board of Tax Appeals upon a statement of facts (R. 52) which with its accompanying exhibits shows the various transactions concerning the real estate by which the tax liability is claimed to arise. The whole question hinges upon a so-called trust agreement (R. 102). The Government contends that this agreement created an estate in joint tenancy. Petitioner asserts that this agreement could not and did not create any estate in joint tenancy nor change the ownership of the property mentioned in it in any way, and that it is nothing more than a collateral agreement concerning the sale

by Mr. Mitchell of his property. To place the Court in the position of the parties at the time it was executed requires a brief statement of the events which preceded it.

Mr. and Mrs. Mitchell were married in 1888 and with the separate property of Mrs. Mitchell bought property which is called in these proceedings the Vermont property. In 1921 title to this property stood in the name of a bank to which it had been transferred as security for indebtedness of Mr. Mitchell. To satisfy this indebtedness Mr. Mitchell secured a loan from King C. Gillette which was evidenced by a note to Security Trust and Savings Bank. The property was then conveyed to Title Guarantee and Trust Company which executed a declaration of trust known as No. 750 (R. 59). This declaration of trust provided that the property might be sold in parcels, the net proceeds to be divided equally between Mr. Mitchell and Mr. Gillette (R. 61). The property was sold and all amounts paid by the trustee to the parties before the death of Mr. Mitchell.

In the following year title to two other parcels of property owned by Mr. Mitchell was transferred to Title Guarantee and Trust Company which executed its declaration of trust No. 822, dated December 14, 1922, naming John W. Mitchell as beneficiary (R. 66). The properties described in this instrument are known in these proceedings as the Santa Monica property and the Cahuenga property. Under the declaration of trust the trustee was to hold title to the property as security for the sum of $68,000.00 borrowed from

L. C. Brand (President of the trust company), by Mr. Mitchell, and, also for the purpose of selling it in whole or in part (R. 73). Upon payment of the amount loaned the assets of the trust were to be held by the trustee for the beneficiary, John W. Mitchell, his heirs or assigns (R. 75).

Another declaration of trust, known as No. 807 and dated December 11, 1922, three days prior to the execution of Declaration of Trust No. 822, deals with part of the same property (R. 80). This instrument recites that Title Guarantee and Trust Company has received title as trustee for the benefit of John W. Mitchell and others to a portion of the Santa Monica property described in Declaration No. 822. This declaration of trust recites that certain property had been sold to the Los Angeles Stone Company and others for a total consideration of $150,000.00, of which $25,000.00 was paid in cash and the balance evidenced by a note of the Los Angeles Stone Company to the order of John W. Mitchell for the sum of $125,000.00 payable in annual installments. The declaration further states its purposes as being (1) To secure the purchase price to the seller; (2) To permit the trustee, acting for the buyers, to subdivide the property (R. 86); (3) To allow the trustee to release portions of the property from the lien of the debt due Mr. Mitchell as evidenced by the promissory note upon the payment of a release price fixed at $100.00 per foot; and (4) to permit the trustee to sell the property or portions thereof and convey the same to purchasers "at such prices and upon such terms and conditions of sale as it may be so directed to do by the Buyers,

provided, however, that the said property shall not be sold at a price less than the Seller's release price * * *'' (R. 87). "All moneys paid to the Trustee for the credit of the Seller for release prices shall accumulate in the hands of the Trustee and be by it disbursed once a month on or before the fifteenth day of every calendar month and shall thereupon be disbursed to the Seller to apply upon the principal of his indebtedness * * *'' (R. 90).

It is perfectly clear that declaration of trust No. 807 was primarily for the benefit of Los Angeles Stone Co., et al., the buyers of certain property, and not Mr. Mitchell. The corporation had given its note for $125,000.00 payable in annual installments. The buyers planned to subdivide the property, sell it and pay the note in favor of Mr. Mitchell. The means for carrying out this plan was to have the trust company hold title for the benefit of Mr. Mitchell on the one hand and the sellers on the other so that when the sellers made a payment upon Mr. Mitchell's note, title to a portion of the property might be conveyed immediately, it being agreed that releases should be upon a schedule of $100.00 per front foot. In other words, the arrangement was simply a convenient form for the collection of the money due Mr. Mitchell as the buyers were able to pay it from the proceeds of property sold by them or otherwise. In effect it established an escrow through which title to real property might be transferred upon payment of the purchase price therefor.

In the year 1923 Mr. Mitchell authorized Title Guarantee and Trust Company to sell all of the Cahuenga

property. Title to this property was conveyed to F. A. Hartwell in two separate parcels, the first of 115 acres in consideration of the sum of $345,000.00, of which $50,000.00 was paid in cash with a note for $295,000.00, secured by a deed of trust on the same property. The second deed conveyed a parcel of 20 acres in consideration of the sum of $110,000.00, of which $20,000.00 was paid in cash with a note for $90,000.00, secured by a deed of trust on the same 20 acres.

Each of these notes was made payable to John W. Mitchell (R. 54).

At the time these two notes and also the one made by Los Angeles Stone Co. were executed and delivered by the payees thereof, Mr. Mitchell deposited them with Title Guarantee and Trust Company as collateral security for the payment of certain indebtedness then owing by him to it. Each of the three notes continued to be held by the trust company during the taxable period here in question (R. 55).

We come then to April 1, 1924, when Declaration of Trust No. 822-B (R. 102) upon which the Government bases its entire case was executed. At that date Title Guarantee and Trust Company held the real property originally conveyed to it, less that which had been sold by Mr. Mitchell in trust under the provisions of its Declaration No. 822 (R. 66). It held the two Hartwell notes and the Los Angeles Stone Company note, each payable to John W. Mitchell, as collateral security (R. 55). The indebtedness of Mr. Mitchell to L. C. Brand (President of Title Guarantee

and Trust Company) described in Declaration of Trust 807 had not been paid. The trust company had also loaned Mr. Mitchell money. Mr. and Mrs. Mitchell thereupon entered into the agreement with the trust company and Mr. Brand which is known as Declaration of Trust 822-B (R. 102).

The purpose of the agreement is perfectly clear. Mr. Mitchell very probably had made some promises to his wife that their property should be held by them in joint tenancy. He had entered into the transactions which have been described and which did not include Mrs. Mitchell as having any interest in the property or its proceeds. Undoubtedly Mr. Mitchell was entirely willing that his wife should be recognized by the trust company as being a joint tenant in the real property still held by it in trust. In the other hand the trust company and its president had loaned Mr. Mitchell a large amount of money without taking the community interest of Mrs. Mitchell into account to the extent of securing her signature. Very probably it insisted that Mr. Mitchell secure the consent of his wife to his hypothecation of the notes which had been given in consideration of the three sales of the real estate.

The agreement recites that the trust company, "at the request of John W. Mitchell and Adina Mitchell, his wife, declares that it holds the said Trusts and all assets thereof in Trust for John W. Mitchell and Adina Mitchell, his wife, as joint tenants, with right of survivorship, subject to all the terms of any assignment or assignments heretofore made to secure

any indebtedness in favor of L. C. Brand, with additional provisions that the said Trusts shall also secure any indebtedness of the Title Guarantee and Trust Company * * *'' (R. 103). The instrument then continues, ''and further the parties hereto hereby assign to Title Guarantee and Trust Company all notes in favor of John W. Mitchell given as part of the purchase price on the sale of property covered by said trusts'' (R. 103). This language relates to notes which the language clearly shows the parties did not regard as part of the ''assets'' of the trust which were mentioned in the first subject considered in the contract. By this provision Mrs. Mitchell transferred to the trust company any rights to the notes which she might have had as the wife of John W. Mitchell or otherwise.

The stipulation of facts (R. 55) and the Statements of the Commissioner of Internal Revenue which are the basis for these proceedings (R. 30, 49) show that all three of the notes were in the possession of Title Guarantee and Trust Company as collateral security from the time of their execution until after the death of Mr. Mitchell. During his lifetime payments made upon them were credited to his account on the books of the trust company and withdrawn by him from time to time. After his death payments continued to be made by the makers of these notes and these amounts were paid to Mrs. Mitchell as executrix. It is not contended by the Government that Mrs. Mitchell personally ever received a dollar of principal or interest on the notes.

In the Return for Federal estate tax filed by Mrs. Mitchell as Executrix of the Will of her husband she included the two Hartwell notes and the Los Angeles Stone Company note as assets of his estate (R. 120). She also returned the sum of $81,148.75 "cash in possession Title Guarantee and Trust Co. of Los Angeles, as trustee" (R. 120). This was the net proceeds of the sale by Title Guarantee and Trust Company after the death of Mr. Mitchell of a portion of the property held by it under Declaration of Trust 822 (R. 57).

Mrs. Mitchell as executrix also filed an income tax return for the decedent for the period January 1, to July 2, 1925 (the date of Mr. Mitchell's death) and, also as such executrix for subsequent income tax periods, to-wit: July 3, 1925 to December 31, 1925, and for the years 1926, 1927 and 1928 (R. 55).

Having assessed and received taxes upon the three promissory notes in question and the other property of Mr. Mitchell, the Government now seeks to go behind its own determination and assess Mrs. Mitchell for her asserted interest in the same property.

The stipulation of facts contains certain errors which were made through inadvertence. These were called to the attention of the Government immediately after the submission of the case to the Board of Tax Appeals. The errors are discussed in the record (R. 163-168) and are obviously the result of a mistake in computation. The Government should not hold petitioner to figures stated in the stipulation of facts which show on their face to be erroneous when it admits the correct figures to be those stated by the petitioner in the addenda submitted.

## SUMMARY OF ARGUMENT.

I. The Declaration of Trust issued on April 2, 1924, by the Title Guarantee & Trust Company of Los Angeles, California, did not create a joint tenancy. Adina Mitchell was never a joint tenant of the real property with her husband and there are no Federal income taxes due and owing from her as a joint tenant.

II. The personal property consisting of the two Hartwell notes and the note of the Los Angeles Stone Company was not placed in joint tenancy by the Declaration of Trust dated April 1, 1924. The income from said personal property was not taxable to Adina Mitchell as a joint tenant.

III. Whether the notes and money were owned in joint tenancy or with the individual property of John W. Mitchell, deceased, they constituted corpus of his estate rather than income payable to Adina Mitchell.

IV. The respondent and the petitioner having agreed that the properties here involved constituted corpus of the estate of John W. Mitchell, deceased, and the Board of Tax Appeals under Docket No. 36231 having rendered its decision based thereon the question is *res adjudicata* and the Commissioner is estopped from claiming the payments on the principal of these properties is taxable as income to the decedent.

V. The three promissory notes and the proceeds on the sale of property made after Mr. Mitchell's death cannot be taxed both as corpus of his estate and also as income to Mrs. Mitchell.

VI. If Adina Mitchell is liable for income tax, the amount of estate tax assessed and paid against the same property should be allowed as an offset.

VII. There is no basis for assessing a penalty against a widow under the circumstances shown in this case.

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## ARGUMENT.

### I.

**THE DECLARATION OF TRUST ISSUED ON APRIL 2, 1924, BY THE TITLE GUARANTEE AND TRUST COMPANY OF LOS ANGELES, CALIFORNIA, DID NOT CREATE A JOINT TENANCY. ADINA MITCHELL WAS NEVER A JOINT TENANT OF THE REAL PROPERTY WITH HER HUSBAND AND THERE ARE NO FEDERAL INCOME TAXES DUE AND OWING FROM HER AS A JOINT TENANT.**

The Government bases its claims solely upon the agreement known as Declaration of Trust No. 822-B (R. 102). However, this instrument contains no appropriate words of transfer to create a joint tenancy or other estate in real property. The trust company declares that it holds the trusts and all assets thereof in trust for John W. Mitchell and Adina Mitchell as joint tenants. But such a statement falls far short of what is necessary to create an estate in joint tenancy, an estate which has come down to us from the common law and which has particular requirements for its creation.

Joint tenancy was an estate at common law, which is defined by Blackstone as follows:

> "The properties of a joint estate are derived from its unity, which is fourfold; the unity of

interest, the unity of title, the unity of time, and the unity of possession; or in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. First, they must have one and the same interest * * * Secondly, joint tenants must also have an unity of title; their estate must be created by one and the same grant, or by one and the same disseisin * * * Thirdly, there must also be an unity of time; their estates must be vested at one and the same period, as well as by one and the same title."

*Cooley's Blackstone,* Third Edition, Sec. 181.

The modern definition of joint tenancy is exactly the same. Corpus Juris states the rule as follows:

"In order to have a joint tenancy, there must exist four unities: (1) Unity of interest. (2) Unity of title. (3) Unity of time. (4) Unity of possession. That is, each of the owners must have one and the same interest, conveyed by the same act or instrument, to vest at one and the same time, except in cases of uses and executory devises; * * *"

33 *Corpus Juris* 907.

All of the standard texts on the law of real property state the same rule. The following is typical:

"It is requisite to the existence of an estate in joint tenancy (a) that the tenants must have one and the same interest, (b) that the interest must accrue by one and the same conveyance, (c) the interest must commence at one and the same time, and (d) it must be held by one and the same un-

> divided possession * * * Unity of title requires that the joint estate shall arise by one and the same act, or by one and the same deed, one and the same devise, or one and the same disseisin. Joint tenants can not acquire under different titles."
>
> *Thompson on Real Property*, Vol. 2, p. 926, Sec. 1711.

Disseisin at common law was, of course, the lowest and most imperfect form of title, resting upon the mere naked possession, or actual occupation of the estate, without any apparent right to hold and continue such possession.

The estate of joint tenancy has been expressly recognized in California by Section 683 of the Civil Code, first enacted in 1872, which until 1929 read as follows:

> "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants."

That each one of the four unities must be present for the creation of an estate in joint tenancy in California under that statute is evident from the case of *Siberell v. Siberell,* 214 Cal. 767, where the Supreme Court held that in this state "husband and wife may take, hold and enjoy real property either as joint tenants, tenants in common or as common or community property." After quoting the statutory definitions of these various estates the Court said:

"From these statutory provisions it is clear that in California we have a modified form of certain estates known to the common law and have them operating alongside of the community property system, an importation from the Spanish law. Naturally, therefore, at times there will appear to be difficulty in harmonizing these systems. But our statutes have been amended from time to time, so altering the original provisions of each of the systems as to allow them both a place in our jurisprudence.

"Respecting joint tenancy, it is only necessary to amplify the definition quoted from section 683 by a quotation from the case of DeWitt v. San Francisco, 2 Cal. 289, 297, opinion rendered in 1852, defining joint tenancy as follows: 'Joint tenancy is a technical feudal estate, founded, like the laws of primogeniture, on the principle of the aggregation of landed estates in the hands of a few, and opposed to their division among many persons. For the creation of a joint tenancy, four unities are required, namely, unity of interest, unity of title, unity of time, unity of possession. 1 Cruise's Digest (by Greenleaf), 355, sec. 11. 2 Crabb's Real Prop. sec. 2303. But the distinguishing incident is a right of survivorship. 1 Cruise, 359, sec. 27. 2 Crabb's Real Prop. sec. 2306.' These four characteristics are the acknowledged elements of a joint tenancy. (1 Tiffany on Real Property, 2d ed. p. 625, par. 191; 2 Blackstone's Commentaries 180.) It is at once evident that there is thereby created but one estate and that each of the four elements, unity of interest, unity of title, unity of time and unity of possession, must be present and an absence of any one would change the nature of the estate.

"Applying the first of these elements, unity of interest, to the situation of a wife holding half the property as her separate estate and the husband holding the other half as community property, it will be at once noted that there can be no unity of interest present, for the interest of the wife would be unequal to and more than that of the husband. This follows because the wife has always had at least a limited interest in the community property (Stewart v. Stewart, 199 Cal. 318, 249 Pac. 197). In 1891 her rights were enlarged to require her written consent to gifts and voluntary transfers of it. In 1917 again her rights were enlarged to allow a division of the common property under certain conditions without a dissolution of the marriage ties, also requiring her signature to convey or encumber it. Again in 1923, sections 1401 and 1402 of the Civil Code were amended to give her equal testamentary power with the husband over it and in the absence of a will by the husband, she, to the exclusion of the children, takes the whole of it. Lastly, in 1927, section 161a was added to the Civil Code investing her with full title to one-half thereof, ceding alone to the husband the management and control thereof."

Under the reasoning of this case there was no joint tenancy created by the instrument executed by Mr. and Mrs. Mitchell for the reason that the four unities were not present. It has been stipulated that Mrs. Mitchell contributed the original purchase price of the property which Mr. Mitchell purchased, and the later additions to his holdings were, under the record in this case, either community property or her separate prop-

erty. Each spouse, therefore, had an interest in the property in dispute long before the agreement under consideration was made. Under such circumstances it seems elementary that they could not, by their joint act, create an estate in joint tenancy in the very property they had theretofore owned by a different title. The Supreme Court in the *Siberell* case said

> "that each of the four elements, unity of interest, unity of title, unity of time and unity of possession, must be present and an absence of any one would change the nature of the estate."

The leading cases in the United States on the creation of an estate in joint tenancy by a conveyance of property by one spouse to himself or herself and the other spouse are *Breitenbach v. Schoen,* a Wisconsin case, and *Deslauries v. Senesac,* decided by the Supreme Court of Illinois.

In the case of *Breitenbach v. Schoen* (Wis. 1924), 198 N. W. 622, one Anna Schoen prior to her death was the owner of certain certificates of stock which she endorsed as follows:

> "For value received, I hereby sell, transfer and assign to Anna Marie Schoen or Peter Schoen, her son, or survivor, the shares of stock within mentioned, and hereby authorize the officers to make the necessary transfer on the books of the corporation."

It was contended that she thereby created an estate in joint tenancy in the certificates in favor of herself and her son. The Supreme Court held that no estate in joint tenancy had thereby been created, stating:

"It is conceded that a joint tenancy may be created in personal property. It is contended that there must be the characteristic unities, namely, unity of time, title, interest and possession. Dupont v. Jonet, 165 Wis. 554, 162 N. W. 664.

It is claimed that under the undisputed facts in this case the deceased could not, by assigning the certificates to herself, create a joint tenancy, because her interest and the interest of the defendants were not created by the same act, nor did the interest of the deceased and the defendant vest at one and the same time. Joint tenancies are no longer favored in the law as they once were. Changes in the law of tenures have to a considerable extent abolished the reasons for the existence of joint tenancies. Courts of law now incline against them. Martin v. Smith, 5 Binn. (Pa.) 16, 6 Am. Dec. 395; 33 C. J. 905, par. 6, and cases cited.

Manifestly, the deceased could not convey an interest in the certificates to herself, and it is quite clear that she did not intend to convey the entire interest in the certificates assigned. Wright et al. v. Knapp, 183 Mich. 656, 150 N. W. 315; Pegg v. Pegg, 165 Mich. 228, 130 N. W. 617, 33 L. R. A. (N. S.) 166, Ann. Cas. 1912(c) 925, and cases cited."

The same conclusion was reached in the case of *Deslauries v. Senesac,* 331 Ill. 437, 163 N. E. 327. In that case a woman acquired title to a lot before marriage and after marriage she and her husband executed a deed purporting to convey the property to themselves as joint tenants and not as tenants in common. The description was followed by the statement:

"Said grantors intend and declare that their title shall and does hereby pass to grantees not in tenancy in common but in joint tenancy."

In holding that this deed did not create an estate in joint tenancy the Court said:

"A transaction involving the transfer of title to real estate presupposes the participation of two or more parties. For every alienation there must be an alienor and an alienee, for every grant a grantor and a grantee, and for every gift a donor and a donee. The words 'convey', 'transfer', and similar words employed in conveyancing, signify the passing of title from one person to another. To make a deed effective, the grantor is divested of, and the grantee is vested with, the title. The requisites of a deed purporting to grant an immediate estate in possession are that there be a grantor, a grantee, and a thing granted. Duffield v. Duffield, 268 Ill. 29, 108 N. E. 673, Ann. Cas. 1916D, 859. A person cannot convey or deliver to himself that which he already possesses. Breitenbach v. Schoen, 183 Wis. 589, 198 N. W. 622; Cameron v. Steves, 4 Allen (N. B.), 141; Perkins on Conveyancing (15th Ed.) p. 42; 13 Cyc. 527. He cannot by deed convey an estate to himself or take an estate from himself. Cameron v. Steves, supra. At common law livery of seizin was necessary to pass the title to real property, and it was recognized that a person could not make livery of seizin to himself. Perkins on Conveyancing (15th Ed.), p. 42. By section 1 of the Conveyance Act (Smith-Hurd Rev. St. 1927, c. 30) livery of seizin has been rendered unnecessary, but the muniment of title, namely the deed, must still be delivered. Devlin on Real Estate and Deeds (3d Ed.) No. 260a, 261.

An estate in joint tenancy can only be created by grant or purchase—that is, by the act of the parties. It cannot arise by descent or act of law. The properties of a joint estate are derived from its unity, which is fourfold, the unity of interest, the unity of title, the unity of time, and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. 1 Sharswood's Blackstone's Com. book 2, p. 180; Freeman on Cotenancy and Partition (2d Ed.) No. 11; 1 Washburn on Real Prop. (6th Ed.) No. 855; 7 R. C. L. p. 811; Gaunt v. Stevens, 241 Ill. 542, 89 N. E. 812.

Ida Deslauries was the sole owner of the half lot prior to the execution of the deed from herself and husband to themselves. She could not by that deed convey an interest in the property to herself. It is manifest from the deed that she did not intend to convey the whole and entire interest to her husband, for she retained an equal share or interest. Hence the interests of Ida Deslauries and her husband were neither acquired by one and the same conveyance, nor did they vest at one and the same time. Two of the essential properties of a joint estate—the unity of title and the unity of time—were therefore lacking. Where two or more persons acquire individual interests in a parcel of property by different conveyances and at different times, there is neither unity of title nor unity of time, and in such a situation a tenancy in common, and not a joint tenancy, is created. Breitenbach v. Schoen, supra; Green v. Cannady, 77 S. C. 193, 57 S. E. 832; 7 R. C. L. p. 811."

*Deslauries v. Senesac,* 163 N. E. 327, 328 (331 Ill. 437).

This case was later followed in *Crow v. Crow,* 348 Ill. 241, 180 N. E. 877, 880, where the Court considered the effect of a conveyance made by a man to himself and his wife. The Court said:

> "Admittedly the Crows could not by a deed to themselves vest themselves with an estate in joint tenancy."

That this is the construction placed upon Section 683 C. C. by the California legislature must be apparent when the history of the statute is considered. Up to 1929 the statute read as above quoted. In that year it was amended by adding the language italicized:

> "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy *or by transfer from a sole owner to himself and others or from tenants in common to themselves, or to themselves and others,* when expressly declared in the transfer to be a joint tenancy or when granted or devised to executors or trustees as joint tenants. *No joint tenancy shall be created except as herein provided."*

In 1931 the statute was again amended dropping the language added in 1929 so that the section again stood in its original form. In 1935 the provisions of the 1929 amendment were restored.

It must be presumed that the legislature had some purpose in making the changes in this statute through the years. Certainly if a joint tenancy could have been created by a "transfer from a sole owner to himself and others or from tenants in common to them-

selves, or to themselves and others'' under the original statute, no change was necessary. Obviously the statute was amended to allow a joint tenancy to be created in a manner different from that required by the California law up to 1929.

In the instant case we have an agreement executed at the time the original statute was in effect and five years before it was first amended. That agreement must of course be construed in accordance with the provisions of Sec. 683 Civil Code as it read at that time. As so construed it seems perfectly clear that no estate in joint tenancy was ever created by the so-called declaration of trust 822-B.

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## II.

**THE PERSONAL PROPERTY CONSISTING OF THE TWO HARTWELL NOTES AND THE NOTE OF THE LOS ANGELES STONE COMPANY WAS NOT PLACED IN JOINT TENANCY BY THE DECLARATION OF TRUST DATED APRIL 1, 1924. THE INCOME FROM SAID PERSONAL PROPERTY WAS NOT TAXABLE TO ADINA MITCHELL AS A JOINT TENANT.**

The Declaration of Trust dated April 1, 1924, states in part as follows (R. 103):

> ''* * * and further, the parties hereto hereby assign to Title Guarantee and Trust Company all notes in favor of John W. Mitchell given as part of the purchase price on the sale of properties covered by said Trusts, * * *''

These words relate to the two Hartwell notes and the note of the Los Angeles Stone Company, which, the language of the instrument clearly shows, the par-

ties did not regard as part of the assets of the trust which were mentioned in the first subject considered in the contract.

By the above quoted provision Mrs. Mitchell transferred to the Trust Company any right to the notes which she might have had as the wife of John W. Mitchell or otherwise.

The stipulation of facts (R. 55) and the statements of the Commissioner of Internal Revenue which are the basis for these proceedings (R. 30, 49) show that all three notes were held by the Title Guarantee and Trust Company as collateral security from the time of their execution until after the death of Mr. Mitchell. During the lifetime of Mr. Mitchell payments made upon the notes were credited to his account on the books of the Trust Company and withdrawn by him from time to time. After his death payments continued to be made by the makers of these notes and these payments were made to Mrs. Mitchell as executrix.

The respondent does not contend that Mrs. Mitchell personally received a dollar of principal or interest on these notes. All payments were made to her as executrix. Accordingly, under the clear and unambiguous language of the Declaration of Trust dated April 21, 1924, the personal property consisting of the Hartwell and Los Angeles Stone Company notes was pledged as security for the personal debts of John W. Mitchell and was not placed in joint tenancy by the Declaration of Trust. This is further shown by action of the Trust Company in crediting the payments to

John W. Mitchell's account during his lifetime and after his death by crediting the payments to his wife as executrix.

Furthermore, as brought out under point I of this brief, the instrument was not sufficient to create a joint tenancy either in the real or personal property. Accordingly any payments on either the principal or the interest on said notes did not constitute taxable income to Adina Mitchell.

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## III.

**WHETHER THE NOTES AND MONEYS WERE OWNED IN JOINT TENANCY OR WERE THE INDIVIDUAL PROPERTY OF JOHN W. MITCHELL, DECEASED, THEY CONSTITUTED CORPUS OF HIS ESTATE RATHER THAN INCOME PAYABLE TO ADINA MITCHELL.**

In the case of *Gwinn v. Commissioner of Internal Revenue,* 287 U. S. 224, 77 L. Ed. 270, the Supreme Court held that the provisions of the Revenue Act of 1924 require the inclusion as corpus of the estate of a deceased resident of California of property held in joint tenancy. In that case, the Court considered *Re Gurnsey,* 177 Cal. 211, 170 Pac. 402, which held that the California inheritance tax law of 1911 "did not undertake to impose a tax upon the rights accruing to a surviving joint tenant upon the death of his cotenant." In holding that property held in joint tenancy must be returned as part of the corpus of an estate for federal tax purposes, the Court held:

> "Although the property here involved was held under a joint tenancy with the right of survivor-

> ship created by the 1915 transfer, the rights of the possible survivor were not then irrevocably fixed since under the state laws the joint estate might have been terminated through voluntary conveyance by either party, through proceedings for partition, by an involuntary alienation under an execution. Cal. Code Civ. Proc., sec. 752; Green v. Skinner, 185 Cal. 435, 197 Pac. 60; Hilborn v. Soale, 44 Cal. App. 115, 185 Pac. 982. The right to effect these changes in the estate was not terminated until the co-tenant's death. Cessation of this power after enactment of the Revenue Act of 1924 presented proper occasion for imposition of the tax. The death became the generating source of definite accessions to the survivor's property rights."

In the case of *Melczer v. Commissioner,* 23 B. T. A. 124, 129, the Board of Tax Appeals also held that property in California held by husband and wife in joint tenancy constitutes corpus of the estate of the deceased joint tenant. The Board refused to follow *Carter v. English,* 15 Fed. (2nd) 6, which held that no part of property held by joint tenancy should be included in the gross estate of a deceased joint tenant under the Revenue Act of 1916, and said:

> "We do not agree with this view of the attributes of an estate in joint tenancy (see United States v. Robertson, 183 Fed. 711; and Knox v. McElligott, 258 U. S. 546), but in any event we do not consider Carter v. English, supra, controlling in the instant proceeding, since we are concerned here with subsections (e) and (h) of section 302 of the Revenue Act of 1924 which by their terms expressly require the inclusion in the gross estate

of a decedent of the full value of property held by such decedent and any other person as joint tenants, *regardless of when such tenancy was created.* The Revenue Act of 1916 had no such retroactive provision. Mary Allen Emery, Executrix, 21 B. T. A. 1038, is, in like manner, distinguishable from the instant proceeding. We held in Rita O'Shaughnessy, 21 B. T. A. 1046, that since it did not clearly appear that section 302(e) and (h), Act of 1924, was unconstitutional, we were constrained to follow it and to hold that the entire value of the property held by the decedent and his wife as joint tenants should be included in the gross estate regardless of when the tenancies were created. We therefore hold that the full value of the property held in joint tenancy by the decedent and his wife in the instant proceeding should be included in the gross estate. See also J. H. Gwinn, 20 B. T. A. 1052.

Even if we should adopt the view of the court as set forth in Carter v. English, supra, as to a joint tenancy, the full value of the property so held would have to be included in the gross estate of the decedent, since the case would then fall within the rule laid down in Tyler v. United States, 281 U. S. 497, with regard to tenancies by the entirety."

## IV.

THE RESPONDENT AND THE PETITIONER HAVING AGREED THAT THE PROPERTIES HERE INVOLVED CONSTITUTED CORPUS OF THE ESTATE OF JOHN W. MITCHELL, DECEASED, AND THE BOARD OF TAX APPEALS UNDER DOCKET NO. 36231 HAVING RENDERED ITS DECISION BASED THEREON, THE QUESTION IS RES JUDICATA, AND THE COMMISSION IS ESTOPPED FROM CLAIMING THAT PAYMENTS ON THE PRINCIPAL OF THOSE PROPERTIES IS TAXABLE AS INCOME TO THE DECEDENT.

The general rule which bars the right of the Government to now proceed against Mrs. Mitchell for income taxes is as follows:

> "Except as to actions of ejectment in some jurisdictions, the modern rule as to the conclusiveness of adjudications respecting title is the same as in case of any other matter which has become res judicata, and no distinction is made in this respect between real and personal property. With the exception noted it may therefore be laid down as a general rule that whatever the form or nature of the action, whenever title or ownership of property comes directly in issue and is litigated to a judgment, such judgment is conclusive upon the same issue whenever it arises in subsequent litigation between the same persons or their privies, even though the cause of action be different or though other or additional property or interests be also involved in the second action." (*Freeman on Judgments* (Fifth Edition), Vol. 2, Sec. 855, p. 1809.)

In the leading case of *Cromwell v. County of Sacramento,* 94 U. S. 351, 24 L. Ed. 195, the Court discussed this rule and said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel,

that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The question actually litigated and determined in the action brought by the respondent to enforce a tax deficiency from the Estate of John W. Mitchell concerned the property which was owned by Mr. Mitchell at the date of his death. An analogous situation is presented in the recent case of *Tait v. Western Maryland R. Co.,* 289 U. S. 620; 77 L. Ed. 1405, where the Court said on this subject:

> "1. The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. Cromwell v. Sac. County, 94 U. S. 351-353, 24 L. Ed. 195-198; Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. ed.

355, 376, 18 S. Ct. 18; United States v. Moser, 266 U. S. 236, 241, 69 L. ed. 262, 264, 45 S. Ct. 66. Since the claim in the first suit concerned taxes for 1918 and 1919 and the demands in the present actions embraced taxes for 1920-1925, the case at bar falls within the second class. The courts below held the lawfulness of the respondent's deduction of amortized discount on the bonds of the predecessor companies was adjudicated in the earlier suit. The petitioner, admitting the question was in issue and decided in respect of the bonds issued by the second company, and denying, for reasons presently to be stated, that this is true as to the bonds of the first company, contends that as to both the decision of the Court of Appeals is erroneous, for the reason that the thing adjudged in a suit for one year's tax cannot affect the rights of the parties in an action for taxes of another year.

As petitioner says, the scheme of the Revenue Acts is an imposition of tax for annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status.

This court has repeatedly applied the doctrine of res judicata in actions concerning state taxes, holding the parties concluded in a suit for one year's tax as to the right or question adjudicated by a former judgment respecting the tax of an earlier year. New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 S. Ct. 905; Third Nat. Bank v. Stone, 174 U. S. 432, 43 L. ed. 1035, 19 S. Ct. 759; Baldwin v. Maryland, 179 U. S. 220, 45 L.

ed. 160, 21 S. Ct. 105; Deposit Bank v. Frankfort, 191 U. S. 499, 48 L. ed. 276, 24 S. Ct. 154. Compare United States v. Stone & D. Co., 274 U. S. 225, 230, 231, 71 L. ed. 1013, 1024, 1025, 47 S. Ct. 616. The public policy upon which the rule is founded has been said to apply with equal force to the sovereign's demand and the claims of private citizens. Alteration of the law in this respect is a matter for the law-making body rather than the courts. New Orleans v. Citizens' Bank, 167 U. S. 398, 399, 42 L. ed. 211, 212, 17 S. Ct. 905. It cannot be supposed that Congress was oblivious of the scope of the doctrine, and in the absence of a clear declaration of such purpose, we will not infer from the annual nature of the exaction an intent to abolish the rule in this class of cases."

In another recent case it has been held:

"The doctrine of res adjudicata applies to a case arising under the internal revenue laws as well as to any other civil action. Old Colony Trust Company v. Commissioner, 279 U. S. 716, 49 S. Ct. 499, 73 L. Ed. 918; Greylock Mills v. White, Collector (D. C.), 55 F. (2d) 704. Nor does the fact that the first suit was against the United States, and the case at bar against the collector of internal revenue, avoid the bar of res adjudicata. Second National Bank of Saginaw v. Woodworth, supra."

*Bertelsen v. White,* 58 F. (2nd) 792, 795.

That the present dispute concerns the same parties and the same subject matter as the estate tax proceeding before the Board of Tax Appeals is also apparent. In a very early case arising in California this Court held:

"Under the statutes of California real estate, like personalty, is assets in the hands of the administrator, and is to be administered, and applied first to the payment of the expenses of administration and debts of the deceased, and then the residue after satisfying all lawful claims distributed to the heirs. Realty and personalty stand upon the same footing, except that the personalty must be first exhausted before the real estate can be sold and applied to payment of the debts of the deceased. The right of possession, and right of action to recover possession of the real estate, vests exclusively in the administrator * * *

He represents the title. If the administrator sues, or is sued, and fails when the title is in issue and determined, the judgment is binding both upon the heirs and the creditors of the estate. The matters thus adjudged would afterwards be res adjudicata between the opposing party in the action and the heirs, as well as the administrator."

*Meeks v. Vassault,* 3 Sawy. 206 (affirmed in 100 U. S. 564).

The case of *Second Nat. Bank of Saginaw v. Woodworth,* 54 Fed. (2nd) 672, is particularly significant in connection with the situation in the instant case:

"Wellington R. Burt, a citizen of Michigan residing in Saginaw, in this district, died on March 2d, 1919. The plaintiff was made executor under the will on August 13, 1920, and continued as executor until May 24, 1922, on which date it was discharged as executor of the estate and appointed testamentary trustee, in which capacity it has ever since acted, and is still acting. On August 14, 1920, the executor filed a federal estate tax return for the decedent, and the tax shown

thereon was assessed and paid. Thereafter the Commissioner assessed an additional tax in the amount of $662,625.89, which resulted from increasing the net value of the estate subject to taxation by adding thereto various gifts of bonds, stocks, and other property made by the deceased to his son and daughters in 1915, some four years prior to his death. The plaintiff under date of June 21, 1923, filed a claim for refund, and, while the claim was receiving consideration by the Commissioner of Internal Revenue, filed a suit in the Court of Claims, which suit set forth, among others, the identical grounds upon which this case is predicated. On January 26, 1926, while the case was pending in the Court of Claims, the plaintiff and the Commissioner of Internal Revenue executed, and the Secretary of the Treasury approved, an agreement whereby a determination was made as to the amount of tax liability. The determination was accepted by the plaintiff, and resulted in a refund to it of $249,220.14. Thereafter, on July 21, 1926, counsel for plaintiff filed a motion in the Court of Claims for dismissal of the suit there pending, which motion recited that the claim for refund sued upon had been reopened by the Commissioner of Internal Revenue, allowed in part, and the amount of the allowance paid to the plaintiff, and that the parties had entered into an agreement in accordance with section 1106(b), of the Revenue Act of 1926 (26 USCA sec. 1249 note), and consenting to the final determination and assessment of the estate tax, whereupon the Court of Claims entered an order dismissing the cause as of October 18, 1926. Thereafter the plaintiff, as testamentary trustee of the decedent's estate, filed with the probate court for the county of Saginaw a petition reciting the action and pro-

ceeding it had taken with respect to the claim of the estate for the refund.

The probate court entered an order on the said petition stating that the trustee's action had been taken without power or authority, and without the sanction or knowledge of the court. The order expressly rejected the attempted settlement, and directed the trustee to take all necessary steps to recover the total amount of tax imposed upon the said gifts, and to report its actions and doings to the court. In compliance with this order, the plaintiff on June 4, 1927, filed a claim for refund in the sum of $256,888.61, which was rejected by the Commissioner of Internal Revenue on the ground that the agreement previously entered into had settled all questions between the parties. On April 6, 1928, without first tendering back to the government the amount refunded, a second petition was filed in the Court of Claims by the plaintiff, based upon the rejection of the claim for refund, and upon demurrer to the petition the court held that the claim set up therein was res adjudicata. The demurrer was sustained, and the petition dismissed. Plaintiff thereafter applied to the Supreme Court of the United States for a writ of certiorari, which was denied, whereupon, on October 2d, 1929, the plaintiff instituted the instant action against Fred L. Woodworth, collector of internal revenue, to which, under the plea of general issue, special defenses were interposed by the defendant, including the defense of res adjudicata."

The Court held that the dismissal by the plaintiff of the second action brought in the Court of Claims barred his recovery.

Certainly the Government should not be able to subject a citizen to continued litigation in different actions upon the same subject matter. The Court of Claims succinctly stated the rule as follows:

> "For these reasons we are of the opinion that when the government voluntarily goes into a court of justice as a plaintiff, its litigation, like that of other suitors, is subject to the general principle that there must be an end of litigation, and that the defendant, whom it impleads against his will and subjects to the risks and costs of litigation, may subsequently invoke, like other defendants, the maxim *Nemo debet bis vexari pro una eadem causa.*"
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> *Fendall v. U. S.*, 14 C. of C. 247, 252.

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## V.

**THE THREE PROMISSORY NOTES AND THE PROCEEDS OF THE SALE OF PROPERTY MADE AFTER MR. MITCHELL'S DEATH CANNOT BE TAXED BOTH AS CORPUS OF HIS ESTATE AND ALSO AS INCOME OF MRS. MITCHELL.**

The stipulated facts in the case show that the three notes which form the basis of the controversy were included in their entirety as corpus of the estate of John W. Mitchell in the Federal Estate Tax return made by the widow and the tax paid thereon. The inclusion of the principal of these notes in the estate tax return was approved by respondent. As a matter of fact respondent proposed a deficiency in the estate tax of John W. Mitchell, deceased; the deficiency was finally stipulated to be $2,589.55, and the Board en-

tered an order finally determining said sum as deficiency in estate tax due from Estate of John W. Mitchell (R. 163).

Likewise, there was reported in the Federal Estate Tax Return of John W. Mitchell, deceased, the sum of $81,148.75, the net proceeds of a sale by Title Guarantee and Trust Company as trustee for John W. Mitchell of Santa Monica real estate. This amount was entered in the estate tax return as cash on hand (R. 120). It was accepted by the Commissioner as corpus of the estate and Federal estate tax paid thereon.

In the instant proceeding, the respondent attempts to tax payments made on the principal of the said notes as income to Adina Mitchell (now deceased) for the years 1925, 1926, 1927 and 1928. Also the Commissioner would treat as taxable income to Adina Mitchell, large sums of money which he has already agreed are corpus of the estate of John W. Mitchell, deceased, and upon which the Government has long since collected estate tax.

Under the recent decision of the Supreme Court of the United States in *Bull v. The United States,* 295 U. S. 247, 79 L. Ed. 1421, the above items cannot be corpus of the estate of John W. Mitchell, deceased, and also income to Adina Mitchell. In that case the Court said:

> "The petitioner included in his estate tax return, as the value of Bull's interest in the partnership, only $24,124.20, the profits accrued prior to his death. The Commissioner added $212,718.79, the sum received as profits after Bull's death, and

> determined the total represented the value of the interest. The petitioner acquiesced and paid the tax assessed in full in August, 1921. He had no reason to assume the Commissioner would adjudge the $212,718.79 income and taxable as such. Nor was this done until July, 1925. *The petitioner thereupon asserted, as we think correctly, that the item could not be both corpus and income of the estate"* (italics supplied).

The instant proceeding presents even a stronger set of facts for the petitioner than *Bull v. United States,* supra. Here we have involved not partnership profits but actual securities, promissory notes and a sum of money included in the estate and taxed as corpus. Nevertheless, the payments on the principal of the notes and a portion of the money have been treated by the respondent as income to Adina Mitchell individually although the notes and the money were actually determined by respondent and the Board of Tax Appeals to be corpus of the estate of John W. Mitchell.

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## VI.

### IF ADINA MITCHELL IS LIABLE FOR INCOME TAX, THE AMOUNT OF ESTATE TAX ASSESSED AND PAID AGAINST THE SAME PROPERTY SHOULD BE ALLOWED AS AN OFFSET.

In the case of *Bull v. United States,* 295 U. S. 247, 79 L. Ed. 1421, the Court considered a situation where the same property was claimed to be subject to an income tax after having been returned as corpus of a decedent's estate. When filing an estate tax return,

the executor included the decedent's interest in a partnership at a value which represented the decedent's share of the earnings accrued to the date of death. The commissioner valued such interest at a greatly increased amount, including profits accruing to the estate after the decedent's death. The increased value was subjected to the payment of an estate tax which was paid.

Thereafter, the executor of the estate filed an income tax return for the estate of the decedent which return did not include as income the amount which had been added by the commissioner to the value of the partnership as income accruing after the decedent's death. The commissioner determined that this amount should have been returned by the executor as income of the estate and notified plaintiff of a deficiency. No deduction was allowed by the commissioner on account of the value of the decedent's interest in the partnership at his death which had been subjected to the federal estate tax. The deficiency income tax was paid and the executor filed a claim for refund, which was rejected. Thereafter, he filed suit in the Court of Claims from which a writ of certiorari was granted by the Supreme Court.

In holding that the taxpayer was entitled to recover, the Court said:

> "In a proceeding for the collection of estate tax, the United States through a palpable mistake took more than it was entitled to. Retention of the money was against morality and conscience. But claim for refund or credit was not presented or action instituted for restitution within the

period fixed by the statute of limitations. If nothing further had occurred Congressional action would have been the sole avenue of redress.

In July, 1925, the Government brought a new proceeding arising out of the same transaction involved in the earlier proceeding. This time, however, its claim was for income tax. The taxpayer opposed payment in full, he demanding recoupment of the amount mistakenly collected as estate tax and wrongfully retained. Had the Government instituted an action at law, the defense would have been good. The United States, we have held, cannot, as against the claim of an innocent party hold his money which has gone into its treasury by means of the fraud of their agent. United States v. State Nat. Bank, 96 U. S. 30, 24 L. ed. 647. While here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights. What was said in the State Nat. Bank Case applies with equal force to this situation. 'An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial * * * In these cases (cited in the opinion) and many others that might be cited, the rules of law applicable to individuals were applied to the United States' (pp. 35, 36). A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction. United

States v. Macdaniel, 7 Pet. 1, 16, 17, 8 L. ed. 587, 592, 593; United States v. Ringgold, 8 Pet. 150, 163, 164, 8 L. ed. 899, 903, 904. In the latter case this language was used: 'No direct suit can be maintained against the United States. But when an action is brought by the United States, to recover money in the hands of a party who has a legal claim against them, it would be a very rigid principle, to deny to him the right of setting up such a claim in a court of justice, and turn him round to an application to Congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to Congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defence, to a suit by the United States.' If the claim for income tax deficiency had been the subject of a suit, any counter demand for recoupment of the overpayment of estate tax could have been asserted by way of defense and credit obtained notwithstanding the statute of limitations had barred an independent suit against the Government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.

The circumstance that both claims, the one for estate tax and the other for income tax, were prosecuted to judgment and execution in summary form does not obscure the fact that in substance the proceedings were actions to collect debts alleged to be due the United States. It is immaterial that in the second case, owing to the

summary nature of the remedy, the taxpayer was required to pay the tax and afterwards seek refundment. This procedural requirement does not obliterate his substantial right to rely on his cross-demand for credit of the amount which if the United States had sued him for income tax he could have recouped against his liability on that score.

To the objection that the sovereign is not liable to respond to the petitioner the answer is that it has given him a right of credit or refund, which though he could not assert it in an action brought by him in 1930, had accrued and was available to him since it was actionable and not barred in 1925 when the Government proceeded against him for the collection of income tax."

Under this authority if any income tax is due from Adina Mitchell, she is entitled to have offset against this amount the estate tax assessed and paid.

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## VII.

**THERE IS NO BASIS FOR ASSESSING A PENALTY AGAINST A WIDOW UNDER THE CIRCUMSTANCES SHOWN IN THIS CASE.**

This is not a case in which a taxpayer attempted to avoid the payment of taxes. Mrs. Mitchell as executrix of the will of her husband made a return of all of the property as corpus of the estate of her husband, and also filed a return in proper form showing income for each of the taxable periods in controversy. In these returns she included income from all of the notes and

properties mentioned, thereby disclosing in detail every item of income upon which a tax might be assessed. Therefore, the assessment of a penalty could only be made against her by reason of a possible error of judgment and could not be based upon failure to disclose or fraud.

We know of no precedent upon which a penal judgment could be rendered against a widow who in good faith gave the Government all information concerning the property in question in the honest belief that it was part of her husband's estate which she was administering under his will.

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**CONCLUSION.**

From the foregoing it appears that the notes were the individual properties of John W. Mitchell before his death; that they were properly included as part of the corpus of his estate in the return filed after his death; and that payments on the principal of the notes did not constitute taxable income to Adina Mitchell. The same is true of the $81,148.75 included in the Estate Tax Return of John W. Mitchell as cash on hand. The Government has taxed all of this property as corpus of Mr. Mitchell's estate. It now seeks to tax the same items as income to Mrs. Mitchell.

Such a position on the part of the Government violates every principle of good faith and fair dealing. To maintain it is to say that the Government may pursue an estate and collect taxes upon all of the property returned as belonging to the deceased and immediately thereafter charge his widow with taxes

on the same property, and penalties also, for failing to disclose an interest which she never asserted as against her husband's estate. The record here conclusively shows that Mrs. Mitchell did everything which was required of her and has paid taxes upon the entire property again sought to be charged with taxes.

Petitioner contends that the judgment of the Board of Tax Appeals should be reversed and that this Court should hold that the notes and monies here involved were not income to Adina Mitchell but corpus of the Estate of John W. Mitchell, deceased. In the alternative, if the Court should determine that the notes and monies were income to Adina Mitchell, then Adina Mitchell is entitled to have the judgment against her reduced by the Estate Tax paid on the notes and monies included in the Estate Tax Return as corpus of the Estate of John W. Mitchell, and without penalty.

Dated, Los Angeles, California,
September 21, 1936.

Respectfully submitted,
CLAUDE I. PARKER,
RALPH W. SMITH,
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No. 8129

# In the United States Circuit Court of Appeals for the Ninth Circuit

DOUGLAS L. EDMONDS, ADMINISTRATOR, ESTATE OF JOHN W. MITCHELL, DECEASED, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DOUGLAS L. EDMONDS, ADMINISTRATOR, ESTATE OF ADINA MITCHELL, DECEASED, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS*

## BRIEF FOR THE RESPONDENT

ROBERT H. JACKSON,
*Assistant Attorney General.*

SEWALL KEY,
NORMAN D. KELLER,
ALEXANDER TUCKER,
*Special Assistants to the Attorney General.*

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COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS*

## BRIEF FOR THE RESPONDENT

### OPINIONS BELOW

The only previous opinion is that of the United States Board of Tax Appeals (R. 171–178), reported in 31 B. T. A. 962, and a memorandum and order of the Board entered July 9, 1935 (R. 196–199).

## JURISDICTION

This appeal involves income taxes for the years 1924, 1925, 1926, 1927, and 1928, and is taken from the decision of the Board of Tax Appeals entered July 29, 1935 (R. 199–200). Three petitions were filed with the Board of Tax Appeals, the first relating to the tax liability of John W. Mitchell for the year 1924 and part of 1925, up to the date of his death (R. 14). The second related to the tax liability of Adina Mitchell for part of the year 1925, and the years 1926, 1927, and 1928 (R. 23). The third concerned the tax liability of Adina Mitchell for the year 1925 (R. 43). The proceedings in the above were consolidated for hearing (R. 171). The case is brought to this Court by a petition for review filed October 18, 1936 (R. 202–222), pursuant to the provisions of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110, Sections 1001–1003, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

## QUESTIONS PRESENTED

1. Whether John W. Mitchell and Adina Mitchell were joint tenants of certain property held for them in trust with the result that the income from such property was taxable one-half to each up to the date of the death of John W. Mitchell and thereafter the whole to Adina Mitchell as the survivor.

2. Whether under the circumstances of this case the principle of *res judicata* may be invoked to pre-

vent taxation of the income in question as that of Adina Mitchell.

3. Whether Adina Mitchell is entitled to recoupment against her income tax in a proceeding before the Board of Tax Appeals of an amount theretofore assessed and paid as an estate tax upon the estate of her husband, John W. Mitchell.

4. Whether penalties of 25 percent of the amounts of the taxes due from Adina Mitchell were properly assessable against her under Section 3176 of the Revised Statutes, for failure to file income tax returns for the years involved.

## STATUTES INVOLVED

The statutes involved herein will be found in the Appendix, *infra,* pp. 29, 30.

## STATEMENT

Three separate cases involving deficiencies for income taxes of John W. Mitchell and Adina Mitchell, both now deceased, were consolidated for hearing before the Board. They are (R. 200):

BOARD DOCKET No. 47516:

Deficiencies in income taxes from John W. Mitchell for the year 1924 and for 1925 until the date of his death, July 2, 1925.

BOARD DOCKET NOS. 70861 AND 66584:

Deficiencies in income taxes of Adina Mitchell for the years 1925, 1926, 1927, and 1928.

The facts as stipulated (R. 52–58), and as found by the Board of Tax Appeals (R. 170) may be summarized as follows:

John W. Mitchell and Adina Mitchell were married in Los Angeles, California, in 1888. Mrs. Mitchell had as her separate property the sum of $10,000, and a smaller sum later inherited, with which funds property at Vermont Avenue and Beverly Boulevard, Los Angeles, was purchased, title being taken in the name of Mrs. Mitchell (R. 52, 53).

Prior to March 1, 1913, John W. Mitchell purchased and took title to two parcels of real estate in or near Los Angeles (R. 53).

In 1915, the Los Angeles Trust and Savings Bank, having made large loans to Mr. Mitchell, demanded additional security therefor, and John W. Mitchell deeded the two above mentioned pieces of property to it. Mrs. Mitchell also deeded to the Los Angeles Trust and Savings Bank her Vermont Avenue property (R. 53).

In 1921, Mr. Mitchell arranged with one King C. Gillette to pay off a portion of his indebtedness to the Pacific Southwest Savings Bank, formerly the Los Angeles Trust and Savings Bank, and to secure the loan caused the Vermont Avenue property to be conveyed to the Title Guarantee and Trust Company in trust for himself and Gillette under a Declaration of Trust No. 750 (R. 53–54, 59–66). In the year 1922, to secure another loan, Mr. Mitchell

caused the Los Angeles Trust and Savings Bank to convey the two other parcels of real estate to the said Title Company, under Trust No. 822, under which Mitchell alone was beneficiary (R. 54, 66–80). A portion of the property included in Trust No. 822 had theretofore been held by the Title Company under Trust No. 807 (R. 71, 80).

In the year 1923, Mr. Mitchell authorized the Title Company to sell a portion of the property held in trust, title to which was conveyed to F. A. Hartwell, who, in consideration therefor, gave cash and two notes, payable to John W. Mitchell, secured by a deed of trust (R. 54).

The two Hartwell notes, together with a note of the Los Angeles Stone Company which was secured by Declaration of Trust No. 807 (R. 85) were also deposited by John W. Mitchell with the Title Company as collateral security for the payment of money then owing by him to it, which notes were held by the Title Guarantee and Trust Company on April 1, 1924, the day and date of Declaration of Trust No. 822B, and also during the taxable periods here in question (R. 55). These notes were found by the Board of Tax Appeals to be part of the aforesaid trust agreement (R. 174). Declaration of Trust No. 822B (R. 102–103) provided in part as follows:

> That whereas, Title Guarantee and Trust Company has heretofore issued its certain

Declarations of Trust #750, #807, and #822, respectively, and

* * * * *

Whereas it was the intention of John W. Mitchell and Adina Mitchell, his wife, that all of said properties should be held by them as joint tenants, with right of survivorship.

Now, therefore, this is to witness that Title Guarantee and Trust Company, at the request of John W. Mitchell and Adina Mitchell, his wife, declares that it holds the said Trusts and all assests thereof in Trust for John W. Mitchell and Adina Mitchell, his wife, as joint tenants, with right of survivorship, subject to all the terms of any assignment or assignments heretofore made to secure any indebtedness in favor of L. C. Brand, with additional provisions that the said Trusts shall also secure any indebtedness of the Title Guarantee and Trust Company, and further, the parties hereto hereby assign to Title Guarantee and Trust Company all notes in favor of John W. Mitchell given as part of the purchase price on the sale of properties covered by said Trusts, and in event of a default in the payment of any indebtedness in favor of L. C. Brand, or Title Guarantee and Trust Company, of any kind or nature, or for any purpose whatsoever, it is a provision hereof that the Trustee may sell the interests of John W. Mitchell and Adina Mitchell, his wife, in and to said Trusts or trust deeds as herein provided, and without the necessity of making de-

mand on the said parties, or the survivor thereof, which said sale shall be in the following manner, namely:

* * * * *

After the death of John W. Mitchell (July 2, 1925), Mrs. Mitchell, as executrix, filed a return for the decedent for the period January 1, to July 2, 1925, and as such executrix for subsequent income tax periods, to wit: July 3, 1925, to December 31, 1925, and for the years 1926, 1927, and 1928. No separate return was filed by Mrs. Mitchell for the year 1925 (R. 55), nor for the years 1926, 1927, and 1928 (R. 55–56).

An estate tax return was also filed for John W. Mitchell, upon which a stipulation of deficiency was entered into, amounting to $2,589.55 (R. 58).

In 1930, delinquent returns were prepared and filed by a deputy collector for Mrs. Mitchell (R. 55) without her knowledge or consent for the period July 2, to December 31, 1925, and for the years 1926, 1927, and 1928, on the theory that the income resulting during said taxable periods was the personal income of Mrs. Mitchell because of her right of survivorship and not the income of her husband's estate. Respondent then determined deficiencies in tax and penalties against Mrs. Mitchell for the years 1925 to 1928, inclusive. The Board of Tax Appeals affirmed the Commissioner's determination with some changes in the amounts involved.

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SUMMARY OF ARGUMENT

Declaration of Trust No. 822B, dated April 1, 1924, issued by the Title Guarantee and Trust Company, created a joint tenancy in John and Adina Mitchell, covering all properties, the income from which is here involved. During life each joint tenant was liable as such for Federal income taxes on his respective share. After the death of the one co-tenant, all income was thereafter taxable to the survivor, Adina Mitchell.

The doctrine of *res judicata,* set forth for the first time in petitioner's brief (p. 41), cannot now be made a question for determination here because its application was not pleaded nor raised before the Board of Tax Appeals in the present case, and because the question said to be *res judicata* was not, in fact, ever raised in any other action which would be dispositive of the issue now before us. Furthermore, even if the issue had been raised it could not now be made to apply, for the parties are not the same, and, lastly, it has been stipulated that the sums are taxable for the periods here involved (R. 56–57).

Recoupment cannot be allowed here under the theory of the case of *Bull* v. *United States,* 295 U. S. 247, and the opinion therein expressed is not applicable to the facts of the case at bar because the said case was an action equitable in nature, the parties were the same, the identical sum was subjected to both estate and income taxes, and the suit was

instituted in a forum having jurisdiction over the cause therein involved—all elements necessary to sustain petitioner's position, each of which is lacking here. The conclusions reached, therefore, in the *Bull* case have no application to the facts of the case at bar.

Section 3176 of the Revised Statutes, as amended, makes a penalty of 25 percent mandatory when any person fails to make and file a return. It is both necessary and proper for the administration of the tax laws. The statute admits of no exception or excuse for failure to so file.

## ARGUMENT

### I

**Declaration of trust no. 822B created a joint tenancy of all real and personal property conveyed to Title Guarantee and Trust Company. Joint tenants are assessable each for 50 percent of the income and on the death of one co-tenant, the survivor is liable for the whole**

#### A

It is to be noted that Docket No. 47516 involves income taxes one one-half of the income stipulated to have been realized prior to the date of John W. Mitchell's death, July 2, 1925 (R. 56, 57). No argument is advanced by the petitioner concerning the Board's finding that one-half of the income for this period was taxable to him (R. 200). It would seem, therefore, that the appeal of this taxpayer is abandoned. Then too, in said taxpayer's appeal to the Board, it is alleged that Mr. Mitchell caused

to have his interests in the trust herein involved assigned "to himself and wife as joint tenants with right of survivorship" (R. 16). Hence, it is apparent that by taxpayer's own allegation, one-half of the distributive income from such trusts was taxable to decedent during his lifetime, and the other half to taxpayer, Adina Mitchell, to whose interest the petitioner's brief is exclusively devoted. Cf. *Bull* v. *United States,* 295 U. S. 247.

B

Petitioner contends that Declaration of Trust No. 822B did not create a joint tenacy in John W. Mitchell and Adina Mitchell. We submit that the Board correctly held that such a tenancy was created. The instrument, itself, in unmistakable language, declares that the Title Guarantee and Trust Company, as trustee, holds all the assets formerly held by it for the benefit of John W. Mitchell, in trust for the said John W. Mitchell and Adina Mitchell, as joint tenants. This trust agreement provided in part (R. 102–103):

> That whereas, Title Guarantee and Trust Company has heretofore issued its certain Declarations of Trust #750, #807, and #822 respectively, * * *.
>
> Whereas it was the intention of John W. Mitchell and Adina Mitchell, his wife, that all of said properties should be held by them as joint tenants, with right of survivorship.
>
> Now therefore * * * Title Guarantee and Trust Company * * * declares that it holds the said Trusts and all assets thereof

> in Trust for John W. Mitchell and Adina Mitchell, his wife, as joint tenants, * * * subject to all the terms of any assignment or assignments * * * and further, the parties * * * assign to Title Guarantee and Trust Company all notes in favor of John W. Mitchell given as part of the purchase price on the sale of properties covered by said Trusts, and in event of a default * * * the Trustee may sell the interests of John W. Mitchell and Adina Mitchell * * * without the necessity of making demand on the said parties, or the survivor thereof * * *.

There is here no question concerning the present or past intention of the parties to create a joint tenancy. Intention has always been given great weight and in many instances, where an equitable estate was created it has been held to be conclusive. *Erwin* v. *Felter,* 283 Ill. 36, 119 N. E. 926; *Perry* v. *Leveroni,* 252 Mass. 390, 147 N. E. 826; *N. J. Title Guar. & Trust Co.* v. *Archibald,* 91 N. J. Eq. 82, 108 Atl. 434; *Blick* v. *Cockins,* 252 Pa. 56, 97 Atl. 125; *Kennedy* v. *McMurray,* 169 Cal. 287; *Conneally* v. *San Francisco S. & L. Soc.,* 70 Cal. App. 180, 232 Pac. 755. Since early history, the cardinal rule in interpreting conveyances has been that every such conveyance should be construed to give effect to the intent of the parties. *Walker* v. *Grogan,* 283 Fed. 530 (E. D. Mich.); *Ames* v. *Chandler,* 265 Mass. 428.

In order to create a joint estate there must be unity, which is four-fold: unity of interest, unity of title, unity of time, and unity of possession. *Siberell* v. *Siberell,* 214 Cal. 767; *DeWitt* v. *San Francisco,* 2 Cal. 289; *Furman* v. *Brewer,* 38 Cal. App. 687; *Colson* v. *Baker,* 87 N. Y. S. 238. It is submitted that all four of these unities were present in the case at bar (R. 197), for: first, the interest of John W. Mitchell and Adina Mitchell was equal—they both had like estates (R. 103); second, the estate of joint tenancy was created by the same instrument (R. 102); third, the estate in joint tenancy arose in each at the same time (R. 102); and, fourth, each joint tenant had title to the whole (R. 103).

All the real property owned by John W. Mitchell and Adina Mitchell was, prior to April 1, 1924, conveyed first to The Pacific Southwest Savings Bank, formerly The Los Angeles Trust and Savings Bank, and then by it to the Title Guarantee and Trust Company, which held the property as security for loans in trust for John W. Mitchell. The Title Company, at the direction of John W. Mitchell, sold a portion of the real property, for which notes and other evidences of security were taken in Mitchell's name. These notes (the Hartwell and Los Angeles Stone Company notes) were in turn deposited with the Title Company and held by it as security for loans previously made to John W. Mitchell, so that on the date Trust Agreement

No. 822B was executed, legal title to all the property here in question was in the name of the Title Guarantee and Trust Company (R. 55, 193, 197).

Thereafter, and at the request of John W. Mitchell, a new trust agreement was executed, to wit: No. 822B (R. 102–105), which, in effect, blanketed all previous trusts executed by the Title Company to Mr. Mitchell. This instrument changed the beneficial interest of all the previous trust agreements from John W. Mitchell to himself and his wife, Adina Mitchell, in accordance with the prior intention of the parties, which was, as stated in Trust No. 822B, the original intention of the parties when the properties were first transferred to the trustee (R. 16, 102), thereby creating a joint tenancy in the Mitchells. It can thus be seen that title to both the real and personal property was not in the name of John W. Mitchell but in the Title Guarantee and Trust Company at the time the estate in joint tenancy was created. Here there was no need to resort to a dummy assignment or any other indirect or circuitous route to effect the desire of the parties. The legal title rested in the name of the Title Company, which, at the request of the beneficiary, changed the use therein back to the original grantors, Mr. and Mrs. Mitchell. This change, therefore, has no analogy to those instances where a grantor, in whom the fee resided, attempted to carve a legal estate out of such fee in himself and another, but was simply the creation

of an equitable joint tenancy out of property already held by a third party (R. 103, 198).

Petitioner cites cases where no such third party is involved. *Breitenbach* v. *Schoen,* 183 Wis. 589, 198 N. W. 622; and *Deslauriers* v. *Senesac,* 331 Ill. 437, 163 N. E. 327. We submit these cases have no application here. There is no California case determining this precise question, but there is, however, ample authority holding contrary to the cases cited by petitioner. *Lawton* v. *Lawton,* 48 R. I. 134, 136 Atl. 241; *Ames* v. *Chandler,* 265 Mass. 428, 164 N. E. 616; *Colson* v. *Baker,* 87 N. Y. S. 238; *Saxon* v. *Saxon,* 93 N. Y. S. 191; *Matter of Klatzl,* 216 N. Y. 87; *In re Horler's Estate,* 168 N. Y. S. 221.

Furthermore, a distinction must be made between the creation of a legal joint tenancy and an equitable joint tenancy, where the conveyance is made in trust to the use of the grantor and another. In the latter instance the conveyance has been held to create a joint tenancy in the use for the benefit of such grantor and another, even where there had been no intervention of a third party and the grant was made direct to the grantor and another. *Brent's case,* 3 Dyer 340, 73 Reprint 766. See also *Kenworthy* v. *Ward,* 11 Hare 202; *Sussex* v. *Temple,* 91 Reprint 1102. In the case of *Colson* v. *Baker, supra,* the court reviewed the early common law principles of estates in joint tenancy and there said (pp. 239–240):

Now, let us suppose that a man has an estate in fee simple, and desires to convey away the fee, and by the same instrument create in himself an estate for years. That this can be done, see *Casey* v. *Buttolph,* 12 Barb. 637; *Culbreth* v. *Smith,* 69 Md. 450, 16 Atl. 112, 1 L. R. A. 538.

In this instance the estate for years and that in fee, subject to the estate for years, would be created by the same act or instrument, although the grantor originally was seized in fee. By his one act he has carved out of his fee a term of years, and a fee limited thereon, and both existed or came into being at the same time. Likewise, out of his fee, he may by direct conveyance, create a tenancy in common for himself and another. His fee is reduced or lessened just so much, but it becomes a tenancy in common by the same act and at the same time. When, therefore, he attempts to create for himself and his grantee an estate in joint tenancy out of his fee by a direct deed to the grantee, why does not the joint tenancy arise at the same time and by the same act? I think it does. Of course, each joint tenant has the same interest by such a deed, and each is in possession of the whole like tenants in common.

In all references to the "four unities" requisite to create a joint tenancy, I find nothing that prevents their existence or creation by the act of the grantor for himself and another as well as by his act for two

other persons. In Thomas' Coke on Littleton (vol. I, p. 732), it is stated: "If a man make a feoffment in fee to the use of himself and of such wife as he should afterwards marry for the term of their lives and after he taketh a wife, they are joint tenants; and yet they come to their estates at several times"—citing *Brent's* case, 3 Dyer, 340. Here the joint tenancy in the use is created by the act of the feoffor for himself and another. If this were an exception to the general rule, or peculiar to husband and wife, or the law of uses, some mention would be made of it by Coke or Blackstone, as it is cited in the chapter on joint tenancy. While it is true that joint tenancy is no longer favored as at common law, yet it still exists when by grant it is expressly declared that the estate is to be a joint tenancy. Real Property Law, art. 2, § 56, Laws 1896, p. 569, c. 547. *Murphy* v. *Whitney*, 140 N. Y. 541, 35 N. E. 930, 24 L. R. A. 123, recognizes the right of coowners to agree among themselves to hold the property as joint tenants, or so that the survivor would take the entire fee. If, therefore, a tenant in common may thus agree with his co-tenant, why may not the owner of the fee likewise agree with his grantee to whom he has conveyed an undivided half?

It being conceded that the intent to create a joint tenancy in Mary Ann Baker and Johanna Baker is clear and distinct, and that it could have been accomplished by a con-

> veyance through a dummy, a third party, I see no reason for insisting upon such circuitousness, but I think it was so created by the deed of Mary and Elizabeth to Mary and Johanna, and that, Johanna having died, Mary took the entire fee by survivorship.

Petitioner contends that the personal property, consisting of the two Hartwell notes and the note of the Los Angeles Stone Company, was not placed in joint tenancy by Declaration of Trust No. 822B (Br. 36). We submit that such notes were part of the aforesaid trust. On the date the said trust was executed, April 1, 1924, the Title Guarantee and Trust Company had legal title to all the property here in question belonging to the Mitchells under Trusts Nos. 750, 822, and 807 (R. 59, 66, 80). Thereafter, part of the property was sold and the said notes and other evidences of security were taken in exchange therefor (R. 54), which were, in turn, deposited with the Title Company as collateral security (R. 55), along with property not disposed of. By Trust Agreement No. 822B it was provided, among other things, that the Title Company "holds the said Trusts and all assets thereof in Trust for John W. Mitchell and Adina Mitchell" (R. 103). A clear construction of the use of the words "all the assets" can mean only one thing, and that was the assets held by the Title Company in trust for the benefit of John W. Mitchell before April 1, 1924, and thereafter held by it in trust for both John W. Mitchell and his co-tenant, Adina

Mitchell. But such assets were not to be free of previous encumbrances, so it was provided that the property held in joint tenancy was to be subject "to all the terms of any assignment or assignments heretofore made" (R. 103). This latter provision was merely a restatement of what John W. Mitchell had previously agreed to.

John W. Mitchell and Adina Mitchell further agreed to the assignment of all the notes already held by the Title Company, which were "given as part of the purchase price on the sale of properties covered by said Trusts" (R. 103), so that in the event of default in the loans made by the Title Company to John W. Mitchell, the present trust agreement (No. 822B) would provide the authority and basis upon which the said trustee "may sell the interests of John W. Mitchell and Adina Mitchell, his wife, in and to said Trusts or trust deeds * * *, without the necessity of making demand on the said parties, or the survivor thereof" (R. 103). To say that the aforesaid notes were to be excluded from the estate thus created would be placing an erroneous construction on the clear terms of the aforesaid trust and would further conflict with that part of the agreement which provided that, "it was the intention of John W. Mitchell and Adina Mitchell, his wife, that all of said properties should be held by them as joint tenants, with right of survivorship" (R. 102).

It seems, therefore, that the Board's finding to the effect that a joint tenancy was created by the

aforesaid agreement of all property, both real and personal, assigned to or held by the Title Guarantee and Trust Company on or before April 1, 1924, was correct and should be sustained (R. 176, 177).

A joint tenancy having been created, Adina Mitchell, as survivor, was the beneficial owner of the whole after John W. Mitchell's death and taxable on the distributable income stipulated to have been derived.

## II

### The doctrine of res judicata is not involved here, nor can recoupment be had in this proceeding

The petitioner contends (Br. 41) that the property involved here was by agreement corpus of the estate of John W. Mitchell under Board Docket No. 36231, and the said Board having rendered its decision to such effect the respondent here is estopped from taxing, under the principle of *res judicata,* it thereafter as income to Adina Mitchell. We submit that this contention is erroneous; that, on the contrary, there is no room here for the application of the doctrine of *res judicata* for several reasons. First, its application was not pleaded nor raised before the Board of Tax Appeals in the present proceeding; second, because the record does not show that the question whether the notes were corpus of the estate was in issue before the Board or decided by that body in the former case, but, on the contrary, the facts appearing of record here indicate that such issue was not presented; third,

even if the issue had been raised and adjudicated, the doctrine would still not apply, for the parties are not the same; and, fourth, it has been stipulated in the present case that the sums are taxable income for the periods involved (R. 56–57). In the case of *Suhr* v. *Commissioner,* 4 B. T. A. 1198, the Board said (p. 1200):

> Stating the rule generally, it is that in order to render a matter *res adjudicata* there must be identity of the thing sued for, identity of the cause of action, and identity of the parties in the character in which they are litigants. *Washington, etc., Steam-Packet Co.* v. *Sickles,* 24 How. 333, 341, 342; *Lyon* v. *Perin & Gaff Mfg. Co.,* 125 U. S. 698, 700. That identity of the parties is essential is settled by *Aspden* v. *Nixon,* 4 How. 467, * * *.

An examination of the record fails to disclose wherein the doctrine of *res judicata* was ever pleaded or raised. Its application was in fact raised in petitioner's brief (B. 41) for the first time. The precise point, therefore, never having been brought to the attention of the Board of Tax Appeals, the petitioner is now barred from raising the question here for the consideration of this Court. A similar situation was present in the case of *Kottemann* v. *Commissioner,* 81 F. 2d) 621, where this Court said (p. 623):

> It is a fundamental rule of federal appellate procedure that only such points as are made in the court below or such questions as are

> there raised will be reviewed on appeal; and, unless the questions or points have been presented to the court below, they are not before this court for review. * * *
>
> This rule is followed in cases coming to the Circuit Court of Appeals from the Board of Tax Appeals. *Jeffery* v. *Commissioner,* 62 F. (2d) 661 (C. C. A. 6); * * *

The record further does not disclose that the notes from which the income was derived were ever in issue before the Board, either as income of Adina Mitchell or corpus of the estate of John W. Mitchell. The few facts set forth therein are indicative of the conclusion that the parties were not at odds on this question. A stipulation referred to by petitioner for the first time in his brief (Br. 41), as having been entered in Board Docket 36231, was a stipulation of a deficiency on estate taxes for decedent, John W. Mitchell, and was not a stipulation that any particular notes were corpus of decedent's estate. Such former decision, however, having been neither pleaded nor introduced in evidence, and it being asserted for the first time in a brief filed by counsel, that such decision was *res judicata* of the facts pleaded in the case at bar, cannot now be made a question for determination by this Court. *Botchford* v. *Commissioner,* 81 F. (2d) 914 (C. C. A. 9th); *Kottemann* v. *Commissioner, supra*; *Reserve Natural Gas Co. of Louisiana* v. *Commissioner,* 15 B. T. A. 951.

As stated in the case of *Suhr* v. *Commissioner, supra,* set forth above, "in order to render a matter *res adjudicata* there must be identity of the parties in the character in which they are litigants." It is essential that the parties be the same. In the present case the parties are not the same, for here the issue concerns income taxes for Adina Mitchell, while the party involved in Board Docket 36231 was the estate of John W. Mitchell over an issue of estate taxes. In *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620, the Court said (p. 623):

> The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand. * * *

Notwithstanding that the doctrine of *res judicata* does not apply to the facts of the present case for the reasons enumerated above, it would still not be applicable because it has been stipulated that the sums here involved are taxable income for the periods involved (R. 56–57).

Furthermore, even if all the above requirements had been met so that under the principle of *res judicata* the notes here involved constituted part of John W. Mitchell's gross estate for estate tax purposes, nevertheless, the income derived from their payment was taxable to Adina Mitchell when the notes were paid. In fact, stipulation as to the value of property properly includable in the gross estate as a measure of estate taxes, in no way precludes the inclusion of the property in the income

of decedent prior to his death, or to another after his death. The value of property held by entirety or joint tenancy is includable in gross estate for estate tax purposes of the tenant first deceased, to the extent furnished by decedent for less than full consideration. *Tyler* v. *United States,* 281 U. S. 497; *O'Shaughnessy* v. *Commissioner,* 60 F. (2d) 235 (C. C. A. 6th), certiorari denied, 288 U. S. 605; *Phillips* v. *Dime Trust & S. D. Co.,* 284 U. S. 160. The income from such estate in entirety or joint tenancy is likewise taxable to the survivor on the same basis as in the hands of the donor decedent. *Lang* v. *Commissioner,* 289 U. S. 109. In that case the court below said in its opinion affirming the Board of Tax Appeals (61 F. (2d) 280, 283 (C. C. A. 4th)):

> The two taxes differ in kind and in incidence, and, as was said by the Board in its decision, "fall on different persons; the estate tax on decedent's estate, and the income tax on the petitioner."

B

Petitioner contends (Br. 51) that under the recent decisions of the Supreme Court of the United States in *Bull* v. *United States,* 295 U. S. 247, if Adina Mitchell is liable for income tax, the amount of estate tax assessed and paid against the same property should be allowed as an offset. Recoupment was permitted in the *Bull* case only because the action was equitable in nature, the parties were

the same, and the identical sum was subjected to both estate and income taxes, the suit was instituted in the proper court and the question properly raised therein, elements necessary to sustain petitioner's position, each of which is lacking here.

Recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. *Bull* v. *United States, supra.* It is an equitable remedy and if raised under proper circumstances would no doubt be allowed, but the facts and the forum upon which the taxpayer here seeks to invoke such remedy do not afford such circumstances. The jurisdiction of the Board of Tax Appeals is statutory and its authority must be expressly authorized or found to exist by necessary implication in the specific language of the Act creating it. Nowhere in the statutes creating the Board, or by later statutes, has Congress invested the Board with power to allow a set-off or a refund of taxes, where, as under the facts now before us, the claim is based upon an entirely different tax and for wholly different years. On the contrary, the jurisdiction of the Board has been specifically limited with respect to the particular taxes for the particular year or years before it by Section 274 (g) of the Revenue Act of 1926. That section provides:

> The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly

> to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

It necessarily follows that if the tax on the estate of John W. Mitchell was overpaid, as the petitioner here must maintain, a credit therefor cannot be allowed in the present proceeding which was not instituted for a redetermination of the estate tax. No doubt an action for that purpose could be maintained in other forums, empowered to hear and determine the cause, but the Board is not such a forum. The Board has jurisdiction only to review the correctness of a proposed deficiency asserted for the taxable year before it and to determine whether there is a deficiency and overpayment for the same year. It cannot determine that a tax for any year, other than the one or ones involving the deficiency, has been underpaid or overpaid (R. 198). *Hazzard* v. *Commissioner,* 4 B. T. A. 150; *Boyer Co.* v. *Commissioner,* 4 B. T. A. 180; *Bruin Coal Co.* v. *Commissioner,* 1 B. T. A. 83; *Harris* v. *Commissioner,* 2 B. T. A. 933.

Even if the Board did have the power, the doctrine of recoupment is still not applicable here because the parties and the transaction are not the same. 40 Am. Dec. 322; Ann. Cases, 1914 B, p. 119.

In the *Bull* case cited by petitioner the Court found that the executor paid an estate tax on a right accruing to the estate, which right the Com-

missioner valued for estate tax purposes in an amount paid to the estate as income, which the Commissioner treated as part of the corpus of the estate, and a few years later the same executor was made to pay a deficiency tax upon the same profits as income to the estate. The situation and facts there presented are not analogous to those of the case at bar. The conclusions reached, therefore, in the *Bull* case with reference to recoupment are not, for the reasons stated, applicable here.

## III

### A penalty is mandatory under section 3176, Revised Statutes

Section 3176 of the Revised Statutes, as amended, *infra,* p. 29, clearly and explicitly provides that if any person fails to make and file a return or list at the time prescribed by law, the Commissioner shall add to the tax due 25 percent of its amount. The statute is necessary for a proper administration of the tax laws, and in terms admits of no exception or no excuse for a failure to so file.

In the case at bar, the taxpayer did not file any return for the years 1925 to 1928, inclusive. Thereupon, the Commissioner under the provisions of Section 3176, Revised Statutes, filed delinquent returns for the said periods. Since, therefore, no returns were filed by the taxpayer, it was mandatory upon the Commissioner to assess the penalty provided under the statutes, regardless of the fact that such failure to file might have been due to a

reasonable cause and not to wilful neglect. *Scranton-Lackawanna T. Co.* v. *Commissioner,* 80 F. (2d) 519 (C. C. A. 3d), affirming a decision of the Board of Tax Appeals, 29 B. T. A. 698, certiorari denied, 297 U. S. 723. The court there said (pp. 519–520):

> Although we are constrained by the statute in question to place the penalty on the taxpayer for failure to file a tax return even where the outcome shows she was not taxable for income on the item in dispute, we deem it proper to say that any relief for her is beyond our power, and if relief is to be granted to her, it can only come through Congress.

See also *Beam* v. *Hamilton,* 289 Fed. 9 (C. C. A. 6th); *Green* v. *Commissioner,* 24 B. T. A. 1121; *Black Diamond Oil Trust* v. *Commissioner,* 25 B. T. A. 142; *Employees Loan Ass'n* v. *Commissioner,* 27 B. T. A. 945.

Petitioner states (Br. 24) that through inadvertence a mistake in computation was included in the stipulation of facts. The Board of Tax Appeals rendered its opinion without having had such fact brought before it, and the Board's opinion does not deal with such subject matter. Petitioner, nevertheless, had the opportunity to call this to the Board's attention in its motion for rehearing (R. 183–196), but failed to do so. The petitioner cannot now complain of his error to properly correct the record, if, indeed, it needed correcting.

CONCLUSION

The decision of the Board of Tax Appeals is in accord with the law and should be affirmed.

Respectfully submitted.

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NOVEMBER 1936.

## APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

> SEC. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1921, there shall be levied, collected, and paid for each taxable year upon the net income of every individual * * *;

Section 210 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, and Section 11 of the Revenue Act of 1928, c. 852, 45 Stat. 791, contain similar provisions to Section 210 (a) of the Revenue Act of 1924.

Revised Statutes, as amended by Section 1103 of the Revenue Act of 1926, and by Section 619 of the Revenue Act of 1928:

> SEC. 3176. If any person, corporation, company, or association fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise. In any such case the Commissioner of Internal Revenue may, from his own knowledge and from such information as he can obtain through testimony or otherwise, make a return or amend any return made by a collector or deputy collector. Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be prima facie good and sufficient for all legal purposes.

If the failure to file a return (other than a return of income tax) or a list is due to sickness or absence, the collector may allow such further time, not exceeding 30 days, for making and filing the return or list as he deems proper.

The Commissioner of Internal Revenue shall determine and assess all taxes, other than stamp taxes, as to which returns or lists are so made under the provisions of this section. In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner of Internal Revenue or the collector in pursuance of law, the Commissioner shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax. In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount.

The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, falsity, or fraud, in which case the amount so added shall be collected in the same manner as the tax (U. S. C., Title 26, Secs. 1512, 1524).

California Civil Code, 1872, p. 161:

683. A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants.

U. S. GOVERNMENT PRINTING OFFICE: 1936

# No. 8129

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

DOUGLAS L. EDMONDS, Administrator, Estate of John W. Mitchell, Deceased, and DOUGLAS L. EDMONDS, Administrator, Estate of Adina Mitchell, Deceased,

*Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

## PETITIONER'S PETITION FOR A REHEARING.

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## Subject Index

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## PETITIONER'S PETITION FOR A REHEARING.

*To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

Petitioner respectfully petitions this Honorable Court for a rehearing concerning, the following portion of its opinion herein:

> "With respect to the notes, however, Trust No. 822-B covers 'the said Trusts and all asets thereof'. The notes would be held in joint tenancy, only if they were a part of the trust property, for the specific reference to the notes in Trust No. 822-B, is sufficient in form to operate as a pledge

of the notes only, and not to make them a part of the trust property. The facts were stipulated and the Board included the stipulation by reference as findings of fact. The stipulation is silent as to whether or not the notes were a part of the trust property. The Board in its opinion stated that 'Certain of the property held under the above trust consisted of notes * * *'. There is also the statement that 'The property in question was held under an indenture of trust providing specifically that the interests of these two parties were as "joint tenants with right of survivorship."' Under these circumstances the Board's finding that the notes were a part of the trust property, is not controverted by anything in the record, and therefore petitioner has shown no error. If the assignments are broad enough to challenge such finding, on the ground that there is no evidence to sustain it, we must hold that the finding is sustained by the presumption of correctness attending the respondent's finding. 26 USCA sec. 1512(c); Buck v. Commissioner (CCA 9), 83 F. (2d) 786, and cases cited."

Let us break down the foregoing quotation from the opinion into its several statements and conclusions, and after considering them separately, we confidently hope the Court will grant this petition.

## Summary of Argument.

### First.

The opinion states that

> "The facts were stipulated and the Board included the stipulation by reference as findings of fact."

Such findings, necessarily, include the exhibits to the stipulation. We respectfully assert that there are no other facts than those included in the stipulation and exhibits, and that all such facts are included in the findings. All else contained in the Board's opinion must be conclusions or assumptions drawn from these facts. The proof of this is that it is only from the facts of the trust of April 1, 1924 (Tr. 102) that the Board could conclude that any of the property was held in joint tenancy.

SECOND.

The opinion states: "The stipulation is silent as to whether or not the notes were a part of the trust property." We respectfully assert that the stipulation is not silent on the point, but, on the contrary, claim that the stipulation and exhibits, properly considered together, disclose indubitably that the notes and proceeds thereof were not part of the trust property, and that any other conclusion therefrom is erroneous.

THIRD.

The opinion assumes that the Board *found* that the notes were part of the trust property. We respectfully assert that the Board did not and could not so *find*, because, necessarily, its findings of fact are those only contained in the stipulation and exhibits. It is true, the Board did, as a matter of law, *conclude* from these facts that the notes were part of the trust property. In that conclusion we contend the Board committed error.

FOURTH.

The opinion states: "If the assignments are broad enough to challenge such finding (conclusion), on the ground that there is no evidence to sustain it, we must hold that the finding (conclusion) is sustained by the presumption of correctness attending the respondent's finding (conclusion)." This statement contains three questions:

(A) Is there evidence to sustain the Board's finding (conclusion) that the notes are part of the trust property?

(B) Are the assignments broad enough to challenge the erroneous finding (conclusion)?

(C) Is the finding (conclusion) sustained by the presumption or correctness attending the respondent's finding (conclusion)?

FIFTH.

The opinion states:

> "Under these circumstances the Board's finding that the notes were a part of the trust property, is not controverted by anything in the record, and therefore petitioner has shown no error."

We believe we shall satisfy the Court that the Board may have drawn such an erroneous conclusion, but that it could not make any such finding of fact. And also we hope to satisfy the Court that such erroneous conclusion is not sustained by, but is actually contrary to, the record.

## Argument.

### FIRST.

The opinion is correct in stating that "The facts were stipulated and the Board included the stipulation by reference as findings of fact." The opinion (Tr. 171) states (Tr. 172): "The facts are formally stipulated and we include the stipulation by reference as our *findings of fact.*" Other than the stipulation and exhibits there were no *"facts"* before the Board. The Board could find no other *"facts"* than those in the stipulation and exhibits. The Board in its opinion itself recognizes this limitation in the very next sentence (Tr. 173), where it says: "Briefly stated the facts are that, etc." Then follows a paraphrase of the facts and certain assumptions and conclusions. But it remains true that the only *"facts"* which the Board could *"find"* are those contained in the stipulation and exhibits thereto. All else in the opinion are assumptions and conclusions drawn from the *"facts"* so found. And it is the assumption or conclusion that the notes and proceeds were part of the trust estate that is here under attack.

---

### SECOND.

The opinion states: "The stipulation is silent as to whether or not the notes were a part of the trust property." Of course, it could not be assumed that either the petitioner or respondent would boldly admit and stipulate that the notes were or were not a part of the

trust estate, any more than it could be asssumed they would boldly admit and stipulate that all or any of the property was held in joint tenancy. That was and remains a *conclusion of law* which was and remains a substantial question in dispute, and concerning which the jurisdiction of the Board of Tax Appeals and this Court is invoked. What the parties did do, and all that it can be supposed they would do, was to stipulate the facts from which such a conclusion, either affirmative or negative, could be drawn. The same is true with respect to the question whether all or any part of the property was held in joint tenancy.

The stipulation first recites (Tr. 52, 53) that Mr. Mitchell, with Mrs. Mitchell's consent, conveyed certain real estate in trust to secure certain indebtedness of the former. The trust indentures covering such conveyance and the trust limitations thereon are incorporated as Exhibits "A", "B" and "C" (Tr. 54). The stipulation then states:

> "In the year 1923 Mr. Mitchell authorized the Title Guarantee and Trust Company to sell all of the Cahuenga acreage, title to which was conveyed to F. A. Hartwell in two separate parcels, the first of 115 acres in consideration of the sum of $345,000.00, of which $50,000.00 was paid in cash with a note for $295,000.00, secured by a deed of trust, evidencing the balance; and the second parcel of 20 acres in consideration of the sum of $110,000.00, of which $20,000.00 was paid in cash with a note for $90,000.00, secured by a deed of trust evidencing the balance.
>
> "Each of these notes was made payable to John W. Mitchell."

It is significant that "each of these notes was made payable to John W. Mitchell." If it had been then intended that the notes or proceeds would become part of the trust estate then, unquestionably, they would have been made payable to the trustee, so that the title thereto would have stood in the name of the trustee just as, and in lieu of, the real estate represented thereby. The stipulation then proceeds:

> "On April 1, 1924, the Title Guarantee and Trust Company issued a Declaration of Trust under number 822-B, a copy of which is hereto attached and marked Exhibit 'D'.
>
> "At that time Title Guarantee and Trust Company held title to the remaining portion of the real estate described in Declaration of Trust No. 822 *not theretofore conveyed to Hartwell or the Los Angeles Stone Company.*"

It is here again significant that the stipulators industriously stipulated that at the time of the execution of trust number 822-B, the construction of which is here in question, set out that *the trustee held only the remaining portion of the real estate not theretofore conveyed to Hartwell and Los Angeles Stone Company. The stipulators did not state that the notes and proceeds were then held by the trustee.* The stipulation then proceeds (Tr. 55):

> "At the times the two notes made by F. A. Hartwell hereinbefore mentioned, and the note made by Los Angeles Stone Company to the order of John W. Mitchell, referred to in Declaration of Trust No. 807, were executed and delivered by the payees thereof, *said John W. Mitchell de-*

*posited them with Title Guarantee and Trust Company as collateral security for the payment of certain indebtedness then owing by him to it.* Said notes continued to be held by said Title Guarantee and Trust Company during the taxable periods here in question."

It is again significant here that the stipulators industriously stated that the transfer of the notes was *"as collateral security for the payment of certain indebtedness then owing by him (Mr. Mitchell) to it."* The stipulators here, by so stating, almost necessarily excluded these notes from the trust estate.

Turning now to Trust Indenture 822-B, of April 1, 1924, which is made a part of the stipulation as "Exhibit D" (Tr. 102), we find that it first refers to the conveyances and declarations of trust theretofore executed by John W. Mitchell (and not his wife) as security, and then proceeds to declare that the property the subject of those trusts shall be held "in trust for John W. Mitchell and Adina Mitchell, his wife, as joint tenants, with right of survivorship," and then, and only then, is there reference made to the notes, indicating clearly that the parties to the trust agreement did not consider the notes to be a part of the trust estate, or something in which Adina Mitchell had any interest thereunder.

To recapitulate, therefore, we have: (a) The original trust indentures were executed only by Mr. Mitchell (recital, "Exhibit D"; Tr. 102); (b) the notes were made payable to Mr. Mitchell (stipulation, Tr. 54); (c) thereupon (Tr. 55) "John W. Mitchell deposited

them with Title Guarantee and Trust Company as collateral security for the payment of certain indebtedness"; and, lastly, (d) the Declaration of Trust 822-B ("Exhibit D"; Tr. 103) divided the property subject to the trust into two categories: one, the real estate which it is declared shall be held as joint tenants, and, two, the notes. These facts are all contained in the stipulation, and therefore we assert that the stipulation is not silent as to whether or not the notes were part of the trust property. That is to say, all the *facts* are set forth, and there are no other facts, from which the Board in the first instance, and this Court in the second instance, could draw its conclusion as to whether the notes were part of the trust estate or not.

---

**THIRD.**

The opinion assumes that the Board *found* that the notes were part of the trust property. We have just demonstrated that the Board could not have *found:* that the Board *found* only the *facts set forth in the stipulation and exhibits.* It is true, the Board *concluded* from such facts that the notes were part of the trust estate. That this conclusion is erroneous is the contention here. That contention was also made before the Board and the argument in support of that contention is well stated in the petitioner's memorandum before the Board found on pages 190-196 of the record and which, in the interest of brevity, will not be here repeated.

FOURTH.

The opinion states: "If the assignments are broad enough to challenge such finding [conclusion], on the ground that there is no evidence to sustain it, we must hold that the finding [conclusion] is sustained by the presumption of correctness attending the respondent's finding [conclusion]." This statement contains three questions:

**(A) Is there evidence to sustain the Board's finding (conclusion) that the notes are part of the trust estate?**

We believe we have quite conclusively demonstrated that the "evidence" and the "findings" are identical. The only evidence before the Board was the stipulation and exhibits thereto, and the Board itself says that the stipulation and exhibits constitute its findings. The question, therefore, assumes a false quantity respecting the difference between the evidence and findings. The real and only question is whether the evidence and findings, identical as they are, sustain the conclusion or, rather, whether a correct conclusion has been drawn from the evidence and findings. In this respect we believe the Court itself has come to the correct conclusion, which will be discussed in our "Fifth" proposition.

**(B) Are the assignments broad enough to challenge the erroneous finding (conclusion)?**

The proposition here under consideration was made most emphatically before the Board (Tr. 190). The decision of the Board, contrary to the contention there made, is assigned as error before this Court as follows (Tr. 216-217):

"5. The Board of Tax Appeals erred in any event by failing to hold and decide that the said Declaration of Trust issued on April 1, 1924, was insufficient to create a joint tenancy with right of survivorship in the Hartwell and Los Angeles Stone Company notes which were definitely pledged with the said Trust Company to secure the individual indebtedness of the decedent, John W. Mitchell."

"9. The Board of Tax Appeals erred by failing to hold and decide that the Hartwell and Los Angeles Stone Company notes constituted a portion of the corpus of the estate of John W. Mitchell, deceased, and accordingly that payments thereon were not taxable as income to the decedent, Adina Mitchell, for the years 1925, 1926, 1927 and 1928."

"10. The Board of Tax Appeals erred by, in effect, holding and deciding that the principal of the Hartwell and Los Angeles Stone Company notes constituted both corpus of the estate of John W. Mitchell, deceased, and taxable income to the decedent, Adina Mitchell, when payments were made thereon during the years 1925, 1926, 1927 and 1928."

Also, it is so assigned in petitioner's brief, pages 8a-13, and the error is discussed in the brief at page 36.

We therefore respectfully claim that the assignments are sufficient to challenge the erroneous conclusion.

**(C) Is the finding (conclusion) sustained by the presumption of correctness attending the respondent's finding (conclusion)?**

Assuming, as we do, that we have satisfactorily demonstrated that the Board made no *finding* upon the subject of whether the notes were or were not included in the trust estate, but only a *conclusion* to the effect that the notes were part of the trust estate; and also assuming, as we do, that we have satisfactorily demonstrated that this erroneous conclusion is controverted by the evidence and findings (which are identical), and that exceptions were properly taken, then, of course, there is no room for any presumption.

---

**FIFTH.**

The opinion states:

> "Under these circumstances the Board's finding that the notes were a part of the trust property, is not controverted by anything in the record, and therefore petitioner has shown no error."

We have already discussed whether the Board made a finding or a conclusion in that respect, and we hope we have satisfied the Court that it is a conclusion and not a finding. Also, we hope we have satisfied the Court that such conclusion is controverted by not only anything but everything in the record. However, this Court, in its opinion, also states:

> "With respect to the notes, however, Trust No. 822-B covers 'the said Trusts and all assets thereof'. The notes would be held in joint tenancy,

> only if they were a part of the trust property, for the specific reference to the notes in Trust No. 822-B, is sufficient in form to operate as a pledge of the notes only, and not to make them a part of the trust property."

May we emphasize that here the Court comes to the correct conclusion that the notes were not a part of the trust estate, but were pledged "as collateral security for the payment of certain indebtedness then owing by him (Mitchell) to it (Title Compeny)" (Tr. 55).

May we ask, respectfully, where the Court secured the facts upon which to base its correct conclusion, if not from the same record from which the Board reached its incorrect conclusion. Obviously, the conclusion was reached from the evidence and facts which were before and under consideration both by the Board and the Court. If from such record before the Court the erroneous conclusion of the Board is controverted, then, obviously, it was controverted before the Board.

### CONCLUSION.

Upon the foregoing analysis of the opinion of the Court, we respectfully petition the Court to grant a rehearing of so much of the opinion as is included in the portion of the opinion quoted.

Dated, San Francisco,
May 3, 1937.

F. ELDRED BOLAND,
KNIGHT, BOLAND & RIORDAN,
*Attorneys for Petitioner.*

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### CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
May 3, 1937.

F. ELDRED BOLAND,
*Of Counsel for Petitioner.*

No. 8130

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

INLAND POWER AND LIGHT COMPANY,
a corporation,

Appellant,

vs.

FAY M. GRIEGER and MARY LOIS GRIEGER,

Appellees.

# Transcript of Record

**Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.**



PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 8130

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# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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COUNSEL OF RECORD:

For Plaintiff and Appellee:

Mr. WILLIAM B. SEVERYNS,
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Mr. WM. P. LORD,
Mr. ARTHUR I. MOULTON,
Mr. HARRY L. GROSS,
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Portland, Oregon.
Mr. BEN ANDERSON,
Corbett Building,
Portland, Oregon.

For Defendant and Appellant:

Messrs. ELLIS & EVANS,
Rust Building,
Tacoma, Washington.
Messrs. JOHN A. LAING and
HENRY S. GRAY,
Public Service Building,
Portland, Oregon.
Messrs. HAYDEN, METZGER & BLAIR,
Tacoma Bldg.,
Tacoma, Washington.

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 8352

FAY M. GRIEGER and MARY LOIS GRIEGER,
Plaintiffs

vs.

INLAND POWER AND LIGHT COMPANY,
a corporation,
Defendant.

SECOND AMENDED COMPLAINT.

Now come plaintiffs and leave of court being had, bring this, their Second Amended Complaint herein, and for cause of action against defendant, allege:

I.

That during all the times herein mentioned the defendant was and now is a corporation, organized under the laws of the State of Oregon, and is the owner and operator of a certain power dam impounding the waters of the Lewis River, which dam is located about twelve miles north and east of the city of Woodland, Washington, and the said defendant has been the owner and operator of said dam for several years last past.

II.

That during all the times herein mentioned plaintiffs were and now are husband and wife, and

plaintiff Fay M. Grieger was and now is the owner of the following described land, located in Clark County, Washington, to-wit:

> Lot No. 4 of Section 4, and Lots Nos. 4, 5 and 10, and the Southeast Quarter of the Northeast Quarter of Section 9, Township 5 North, Range 1 East of the Willamette Meridian, excepting however, a strip of land forty rods wide off of and along the entire east side thereof, the balance containing 100.66 acres, more or less. [1*]

III.

That said Lewis River by nature follows along the west boundary of plaintiffs' said lands, and plaintiffs operate said lands for farming purposes, and maintain thereon their home, farm buildings, fences and farm improvements.

IV.

That in the construction of its aforesaid dam the defendant erected said dam at a point on the Lewis River where the said river passes through a narrow gorge, and the said dam was constructed to a height of approximately 240 feet, and so designed that save for the flood gates hereinafter mentioned and described, the same would impound the waters of the Lewis River to a height of approximately 240 feet and for a distance back of the said dam of approximately fourteen miles, thereby forming a

*Page numbering appearing at the foot of page of original certified Transcript of Record.

body of slack water commonly known as Lake Merwin, which body of water covers approximately 4,000 acres. That defendant, in the construction of its said dam, equipped the same with four flood gates, each extending approximately 39 feet laterally across the said river, and approximately 32½ feet high, and an additional flood gate extending ten feet laterally across said river and approximately 32½ feet high. That the flood gates were so designed that when opened great quantities of water would be discharged through them, and the said gates were so constructed that by means thereof, when in proper working order, the water accumulated in the said lake would be discharged through the said gates, and the level of the water behind the dam would be lowered to approximately 205 feet, according to the gauge at the said dam maintained by defendant, and so that there could be discharged through the said flood gates waters accumulated in the said lake to a depth in excess of 35 feet. The defendant, in the construction of said dam, carelessly and negligently erected immediately below the base thereof, a power plant and power-generating machinery, so situated that if [2] the waters rose in said lake above the level of approximately 240 feet by said gauge, the same would be discharged over the top of said dam into and upon defendant's said power plant, and that great damage would be inflicted thereupon, so that it was impracticable for defendant to maintain said dam with the aforesaid flood gates closed and thereby

permit the waters of said river to accumulate in said lake, and ultimately pass over the top into said dam. Defendant likewise for the protection of its said power plant, erected an apron with bulkheads at the sides thereof, so designed as to form a chute from the said gates directing water released thereon into the current of the said Lewis River, and so designed as to cause water released by means of the said flood gates to flow down stream in the said Lewis River below defendant's said dam, and thereby to increase not only the quantity of water in said Lewis River below the dam, but the force and violence of such water as might be released by means of flood gates.

V.

That for a period in excess of thirty days prior to the 21st day of December, 1933, there was and had been great and unusual rainfall in the watershed of the aforesaid Lewis River above the defendant's said dam, and the waters of said Lewis River above defendant's said dam were thereby caused to rise, and the flow thereof was increased, but notwithstanding the said rainfall and consequent rise of the water in said Lewis River, and notwithstanding the aforesaid careless and negligent construction and maintenance of its said dam, and the likelihood that in event of the rise of waters therein contained, defendant would be compelled to open its said flood gates and discharge the accumulated water of said dam through said flood gates, the defendant carelessly and negligently

permitted the water of Lake Merwin to rise and remain at a gauge level of 235 feet and above [3] the said point, and carelessly and negligently failed to open its said flood gates sufficiently to permit the accumulated waters of the said stream to flow gradually past its said dam, as they were wont to do by nature. That the defendant thereby held and maintained in and behind its said dam a quantity of water of such great volume that there was great and imminent danger that if defendant were compelled to open all its flood gates the flow of the waters in the said Lewis River below the said dam and past the plaintiffs' said property would be so enhanced in volume and accelerated in speed that great and irreparable damage would be inflicted upon plaintiffs' said property.

VI.

That on or about the 20th day of December, 1933, due to the continuing rainfall in the aforesaid watershed, the waters of said Lewis River rose rapidly for a period of about eight hours, and thereafter, for a period of about 24 hours rose gradually, and the waters so impounded by defendant and by the aforesaid dam increased in volume and rose to a gauge height in the said dam of approximately 237½ feet, and there was, by reason thereof, and by reason of the careless and negligent manner in which defendant had constructed its said power house at the immediate base of its said dam, great and imminent danger that the said waters continuing to rise in the said

dam would be discharged over the top thereof and into and upon the defendant's said powerhouse. Thereupon, wholly due to the careless and negligent maintenance and construction of defendant's said dam and powerhouse, and wholly due to defendant's carelessness and negligence in failing to open the said flood gates sufficiently and thereby permitting the waters in the said dam to rise to the height aforesaid, and without care or regard to the damage thereby likely to be inflicted upon plaintiffs' said property, defendant carelessly and negligently and [4] without warning to plaintiffs, and without regard to the damage which might thereby be inflicted upon their property, on or about midnight of December 21, 1933, opened all its aforesaid floodgates and caused thereby vast quantities of water, by defendant so carelessly impounded by its said dam, to be suddenly and with great force discharged through its said flood gates and over the said apron directly into the current of said Lewis River, and by reason thereof the flow of waters in the said Lewis River was increased in volume, and accelerated in force, and thereupon, wholly due to the negligence of defendant in the construction of its said dam and power plant and flood gates, backwater was caused to be formed behind the outlet of said apron and water and debris was caused to enter the said power house and the machinery, by defendant maintained therein and by it designed to open and close its said flood gates, was disabled, and defendant was unable to close its said flood gates, and by reason of the negligence of the defend-

ant as aforesaid, the same were forced to remain open for a period approximating twenty-four hours, and the waters accumulated in the said lake behind defendant's said dam, to the extent of approximately 17,000 acre-feet, were discharged through the said flood gates, in addition to the normal flow of the waters of said Lewis River into the channel of the said Lewis River with great force and violence, and during the said period of twenty-four hours the waters of the said Lewis River were caused to be increased in volume and accelerated in force so that the same flowed over the plaintiffs' aforesaid land with great volume and with great force, and cut away portions of the soil in said land, and destroyed the usefulness thereof for farming purposes, and deposited vast quantities of sand and rocks and debris upon the said land, and destroyed plaintiffs' crops growing thereon, and plaintiffs' fences thereon, all to plaintiffs' damage in the sum of Fifteen Thousand One [5] Hundred Fifty Dollars ($15,150.00).

That an itemized statement of the damage inflicted upon plaintiff's lands by the carelessness and negligence of defendant is appended hereto, marked "Exhibit A" and made a part hereof.

VII.

That plaintiffs are residents and citizens of the State and District of Washington, and citizens of a different state than defendant.

VIII.

That defendant is a citizen of the State of Oregon and diversity of citizenship exists between plaintiffs and defendant.

IX.

That the amount in controversy in this cause is greater than the sum of $3,000.00, exclusive of interest and costs.

WHEREFORE plaintiffs pray for judgment against defendant for the sum of Fifteen Thousand One Hundred Fifty Dollars ($15,150.00), and for their costs and disbursements incurred herein.

WM. B. SEVERYNS,
405 Arctic Bldg. Seattle, Wash.
WM. P. LORD,
HARRY L. GROSS,
Attorney for Plaintiffs. [6]

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EXHIBIT A.

The following described land and personal property of plaintiffs was damaged and destroyed by the negligent acts of defendant as alleged:

| | |
|---|---|
| 71 acres plaintiffs' lands | $ 9,950.00 |
| 50 acres pasture lands (included in above) destroyed for pasture purposes; monthly rental value of $60.00 per month for 7 months | 420.00 |
| Seeding aforesaid 50 acres of pasture land | 80.00 |

| | |
|---|---|
| 34 acres growing crop of oats and veatch, at $25 per acre (21 acres included in the above 71 acres destroyed, 13 acres in addition flooded at time of injury but now tillable) | 850.00 |
| 2300 feet new wire fence | |
| 3000 feet wire cross fencing | 500.00 |
| Standing timber destroyed | 200.00 |
| Loss by severance (Plaintiff uses within property as dairy ranch, wherein he has maintained 37 head of cattle, and in 1930 built a modern barn approximately 47x80, part cement, at cost of $2500, and in 1929 built a modern house in addition to one already upon the premises, at a cost of $2,250.00. The destruction of more than two-thirds of the land has caused the depreciation in the value of the establishment for dairy purposes and to sustain the above buildings in the amount listed) | 3,150.00 |
| | $15,150.00 |

[7]

[Verification and Service.]

[Endorsed]: Filed Mar. 9, 1935. [8]

[Title of Court and Cause.]

## ANSWER TO SECOND AMENDED COMPLAINT.

Comes now the defendant and for answer to the plaintiffs' second amended complaint herein, denies, admits and alleges:

I.

Admits the allegations of paragraph I thereof.

II.

Answering paragraph II thereof, defendant admits that the plaintiffs during all of the times mentioned in said second amended complaint were and now are husband and wife, and that said plaintiffs were in possession of the lands therein described, but this defendant has no knowledge or information sufficient to form a belief as to whether the plaintiff, Fay M. Grieger, was at any time or now is the owner of said described land or as to the acreage thereof, and therefore denies said allegations.

III.

Answering paragraph III thereof, defendant admits that the plaintiffs operated said lands for farming purposes and maintained thereon their home, farm buildings, fences, and farm improvements, but denies that said Lewis River by nature follows along the west boundary of plaintiffs' said lands.

IV.

Answering paragraph IV thereof, defendant admits that its said dam was constructed at a point

on the Lewis River where the said river passes through a narrow gorge, and that the waters impounded by said dam formed a [9] body of slack water commonly known as Lake Merwin, which body of water covers approximately 4,000 acres and extends back of said dam a distance of approximately 12 miles; denies that said dam was constructed to a height of 240 feet, but alleges the fact to be that said dam was constructed to an elevation of approximately 240 feet above sea level, U. S. G. S. datum, and denies that said dam was so designed that save for its flood gates it would impound the waters of said Lewis River to a height of 240 feet, or to any elevation in excess of 238.35 feet, above said datum, with the gates closed, and alleges the fact to be that it was impossible to impound said waters behind said dam to an elevation in excess of approximately 238.35 feet above said datum without spilling water over said gates, if closed. Admits that said dam is equipped with four flood gates, each extending approximately 39 feet laterally across the said river and approximately 33.35 feet high, and with an additional flood gate extending 10 feet laterally across said river and approximately 33.35 feet high. Admits that said flood gates were so designed that, when opened, water would be discharged through them, and that when all of said gates were fully opened the water behind said dam could be lowered to the gauge elevation of approximately 205 feet above said datum; but denies that the waters accumulated

in said lake could thereby be discharged through said gates to a depth in excess of 35 feet, or to any depth in excess of approximately 33.38 feet. Admits that the defendant erected downstream from said dam a power plant and power generating machinery, but denies that said power plant or power generating machinery were erected immediately below the base of said dam or were so situated that if the waters rose in said lake above the level of approximately 240 feet elevation by said gauge, or to any other elevation, the same would be discharged over the top of said dam into and upon defendant's said power plant, and denies that great or any damage would thereby be inflicted thereupon, and denies that in the location, erection or construction of said power plant or power generating machinery the defendant was in any respect careless or negligent, but admits that it was impracticable to permit the waters of said river so to accumulate in said lake as to flow or pass over the top of said dam, and alleges the fact to be that said dam was not designed so to discharge the waters accumulated in said lake. Admits that [10] said defendant erected an apron with guide walls immediately below the gates of said dam, and so designed as to cause water released by means of and through said flood gates to flow downstream in the said Lewis River below defendant's said dam, but denies that said chute or guide walls were erected for the protection of said power plant, and denies that the effect of said apron or of said guide walls was to increase the quantity of such

water as might be released by means of said flood gates, and denies that the effect thereof was to increase the force or violence of said water except at that point and for a short distance downstream from said apron; and denies each and every other allegation of said paragraph IV except as and to the extent hereinbefore admitted, qualified or alleged.

V.

Answering paragraph V thereof, defendant admits and alleges that for approximately 17 days prior to the 21st day of December, 1933, there was and had been great and unusual rainfall in the watershed of the aforesaid Lewis River above the defendant's said dam, and that the waters of said Lewis River above said dam were thereby caused to rise and the flow thereof was increased; admits that the defendant permitted the waters of Lake Merwin to rise and remain at a gauge elevation of approximately 235 feet, that being the elevation at which said lake was normally maintained, but denies each and every other allegation in said paragraph V contained, and expressly denies that as to any of the matters or things in said paragraph alleged this defendant was in any respect or at any time careless or negligent.

VI.

Answering paragraph VI thereof, defendant admits that on or about the 20th or 21st day of December, 1933, and due to the continuing rainfall in the aforesaid watershed, the waters of said Lewis

River above defendant's said dam rose rapidly and increased in volume, and rose to a gauge elevation above said dam of approximately 237½ feet; admits that there was great and imminent danger that said waters continuing to rise in the said dam would be discharged over the top of said dam; admits that the waters of said Lewis River flowed over plaintiffs' aforesaid lands and did [11] certain damage thereto, as to the nature, extent and pecuniary amount of which defendant is uninformed; but defendant expressly denies that said plaintiffs were damaged in the sum of $15,150.00, or any other sum, by reason of any negligent act or omission of this defendant, and denies that at any time in the construction, maintenance or operation of said dam, or of said flood gates, or in any other respect, this defendant was at any time careless or negligent.

That this defendant has no knowledge or information sufficient to form a belief as to whether or not the itemized statement of the alleged damage caused to plaintiffs' lands or property by said flood waters is as set forth in plaintiffs' "Exhibit A", attached to their said complaint, and therefore denies said allegation; and this defendant denies that any damage to said lands or property caused by said flood waters, or otherwise, was due to carelessness or negligence of this defendant, and denies that this defendant is in any way or manner liable for said damage or any part thereof; and defendant denies each and every other allegation in said para-

graph VI contained, except as and to the extent hereinbefore admitted, qualified or alleged.

VII.

Admits the allegations of paragraph VII thereof.

VIII.

Admits the allegations of paragraph VIII thereof.

IX.

Admits the allegations of paragraph IX thereof.

SECOND.

For a further and affirmative defense to plaintiffs' second amended complaint, defendant alleges:

I.

Defendant here reiterates, repeats and adopts each and all of the allegations, averments, denials and admissions of its foregoing answer to plaintiffs' second amended complaint herein, and makes the same, and each [12] and all of them, a part of this further and affirmative defense with like force and effect as if the same were set forth herein verbatim.

II.

That the Lewis River referred to in plaintiffs' second amended complaint is a navigable stream, and prior to the construction of defendant's said dam defendant was required to obtain and did obtain the permission of the United States government, acting by and through the Federal Power Commission, and also the permission of the State of Wash-

ington, acting by and through its Department of Conservation and Development for the construction and erection of said dam upon said stream, and that said dam, including its flood gates and facilities, and said power house and its facilities, were constructed in all respects in accordance with plans submitted to and approved by the said United States of America, acting by and through said Federal Power Commission, and also by the State of Washington, acting by and through said Department of Conservation and Development, and said dam and power house and their respective appurtenant facilities at the time of their construction represented and do represent the best engineering skill and ability, and the construction, operation and maintenance of said dam has at all times been in accordance with recognized and accepted engineering standards and free from negligence or carelessness of any kind or nature.

III.

That for many days prior to the 21st day of December, 1933, an unprecedented rainfall had prevailed throughout the western part of the state of Washington with the result that most of the streams of said state reached flood proportions. That said rainfall throughout the watershed of the Lewis River was extraordinary and unprecedented, and was combined with abnormally high temperatures for the season of the year, and caused the snows in said watershed to melt with unusual rapidity. That the combination of said rainfall, high temperatures

and melting snow resulted in unprecedented flood conditions in said stream, and by reason thereof all of the lands adjacent to said Lewis River were subject to unusual and [13] unprecedented hazards and perils from said flood waters. That at all times during said flood this defendant maintained and operated the gates of its said dam in accordance with the best engineering practice and skill and consistently with the flood perils existing at said time and place, and solely with the purpose of minimizing the damage that would inevitably result to lower landowners on said stream by reason of the natural run-off of said flood waters; and this defendant alleges the fact to be that said flood was an act of God for which this defendant was and is in no way responsible or liable, and that all damage sustained by plaintiff, for which they seek recovery in the above entitled action, was solely due to said unprecedented flood; that none of the damage suffered by plaintiffs from said flood waters was due to or resulted from any negligent act or omission of this defendant in its construction, maintenance or operation of said dam, flood gates, power house or other facilities, and defendant alleges that it was not at any time or in any way or manner careless or negligent in the construction, maintenance or operation of said dam, flood gates, power house or other facilities, or otherwise.

WHEREFORE, having fully answered said second amended complaint, defendant prays that the same may be dismissed, and that defendant recover

of and from plaintiffs its costs and disbursements incurred herein.

ELLIS & EVANS
JOHN A. LAING and
HENRY S. GRAY
Attorneys for Defendant [14]

[Verification and Service.]

[Endorsed]: Filed May 31, 1935. [15]

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[Title of Court and Cause.]

REPLY.

Now come plaintiffs and replying to defendant's answer and to its further and affirmative defense to plaintiffs' second amended complaint, deny each and every allegation, matter and thing therein contained, except so much thereof as is expressly set forth and alleged in and by plaintiffs' Second Amended Complaint.

WHEREFORE plaintiffs reiterate the prayer of their Second Amended Complaint.

WM. B. SEVERYNS
WM. P. LORD
HARRY L. GROSS
Attorneys for Plaintiffs.

[Verification and Service.]

[Endorsed]: Filed Jun 25, 1935. [16]

[Title of Court and Cause.]

VERDICT.

We, the jury empanelled and sworn to try the issues in the above-entitled cause, find for the Plaintiffs and assess their damages in the sum of Four Thousand & 00/100 Dollars ($4000.00).

W. M. BARRETT,
Foreman.

[Endorsed]: Filed Oct. 8, 1935. [17]

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[Title of Court and Cause.]

PETITION FOR NEW TRIAL.

Comes now the defendant, Inland Power & Light Company, a corporation, by its attorneys, Ellis & Evans, John A. Laing and Henry S. Gray, and respectfully petitions this Honorable Court for a new trial in this cause, under Rule 74 of the Rules of this Court, on the following grounds:

1. Abuse of discretion by which the defendant was prevented from having a fair trial.

2. Excessive damages appearing to have been given under the influence of passion or prejudice.

3. Insufficiency of the evidence to justify the verdict, to-wit:

(a) Insufficiency of the evidence to show that any negligent act of the defendant caused any of the damage to plaintiffs' land;

(b) Insufficiency of the evidence on damages from which the jury could determine that the plaintiffs' property was damaged in the sum of $4,000.00 or any other sum by negligence of the defendant;

(c) Insufficiency of the evidence to show that surplus water allowed to flow in the Lewis River on December 22nd, 1933, caused any damage;

(d) Insufficiency of the evidence to show what, if any, damage was done to the plaintiffs' land by nature or the natural flow of the Lewis River;

(e) Insufficiency of the evidence to show any actionable negligence on the part of defendant resulting in injury to the plaintiffs' land.

4. Errors in law occurring at the trial and excepted to at the time by the defendant, to-wit: [18]

(a) Error in law in permitting the witnesses, Carl E. Insull and Fay M. Grieger, or either of them, to testify as to the reasonable market value of the plaintiffs' lands immediately before and immediately after the December, 1933, flood, each of whom by its own testimony having affirmatively shown that he was not qualified so to testify, and their testimony being highly prejudicial to the defendant.

(b) Error in law in over-ruling and denying the defendant's motion to require the plaintiffs, prior to the introduction of any evidence, to elect upon which of their two grounds of alleged negligence they would proceed, namely, upon the alleged negligence of the defendant in failing, on the one hand, so to construct its power plant as to make it practicable to maintain the dam with its flood gates closed and to impound the waters in said lake to such an extent that they could overflow the dam without inflicting injury upon the power

house, as alleged in paragraph IV of the amended complaint, and, on the other hand, the alleged negligence of the defendant in failing so to operate the gates of said dam that the waters of said stream would flow past said dam "as they were wont to do by nature", as alleged in paragraph V of said complaint; said motion being based upon the ground that said two grounds of alleged negligence were inherently inconsistent, contrary with and destructive of each other in this, to-wit: that the storage or accumulation of any quantity of water whatsoever inherently precludes and renders impossible the permitting of said waters to run as they were wont to do by nature.

(c) Error in law in over-ruling and denying the defendant's motion for a non-suit, which motion was based upon the following grounds, severally, to-wit:

1st, a total failure of proof of actionable negligence.

2nd, that the evidence conclusively shows there was unprecedented flood which caused the damage to the plaintiff's property, regardless of any conduct of the defendant.

3rd, that the evidence affirmatively shows the exercise of reasonable care by the defendant.

4th, that any verdict permitted to be returned to the court by the jury on [19] the evidence as it now stands would be purely speculative and without basis for computation.

This petition is based upon the records and files of this cause, the pleadings, the court reporter's

transcript of the testimony and upon the Court's minutes of the trial.

ELLIS & EVANS
JOHN A. LAING, and
HENRY S. GRAY
Attorneys for Defendant

[Verification and Service.]

[Endorsed]: Filed Oct. 19, 1935. [20]

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[Title of Court.]

RECORD OF PROCEEDINGS.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 23rd day of November, 1935, the Honorable Edward E. Cushman, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court as follows:

[Title of Cause.]

RECORD OF HEARING.

On this 23rd day of November, 1935, Motion for New Trial comes regularly on for hearing, plaintiffs appearing by W. P. Severyns and the defendant appearing by R. E. Evans, one of its attorneys. Motion is argued by counsel for defendant. Motion for New Trial is denied and exception is allowed defendant. [21]

United States District Court, Western District of Washington, Southern Division.

No. 8352.

FAY M. GRIEGER and MARY LOIS GRIEGER,
Plaintiffs,

vs.

INLAND POWER & LIGHT COMPANY,
a corporation,
Defendant.

JUDGMENT ON THE VERDICT.

This day, to-wit: November 25th, 1935, this cause came on for hearing upon the Motion of Plaintiffs for a Judgment on the Verdict, which verdict was returned to the Court on the 8th day of October, 1935 and is as follows:

> "We, the jury empanelled and sworn to try the issues in the above-entitled cause, find for the Plaintiffs and assess their damages in the sum of Four Thousand & no/100 Dollars ($4,000.00).
>
> W. M. Barrett, Foreman."

the plaintiffs appeared by their counsel, Wm. P. Lord and the defendant not appearing, and it further appearing to the Court that Plaintiffs' motion for Judgment in accordance with the said verdict should be allowed and the Court being fully advised in the premises,

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiffs have of and recover from the defendant the sum of Four Thousand Dollars ($4,000.00), together with their costs and disbursements herein to be taxed.

Done in open Court this 25th day of November, 1935.

(Signed) EDWARD E. CUSHMAN
Judge

[Service.]

[Endorsed]: Filed Nov. 25, 1935. [22]

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[Title of Court and Cause.]

STIPULATION FOR EXTENSION OF TIME FOR SETTLEMENT OF BILL OF EXCEPTIONS.

It is hereby stipulated by the parties to the above entitled action, by their respective attorneys of record herein, that the defendant may be allowed ninety (90) days from the date of entry of the verdict in said action, to-wit, to and including the 6th day of January, 1936, within which time to prepare, serve and tender for settlement its bill of exceptions in said action, and that an order in conformity with this stipulation may be entered by the above entitled court, or by the judge thereof.

upon application of said defendant and without other or further notice thereof.

Dated this 11th day of October, 1935.

WM. P. LORD
GROSS & ANDERSON
Attorneys for Plaintiffs.
ELLIS & EVANS
JOHN A. LAING and
HENRY S. GRAY
Attorneys for Defendant

[Endorsed]: Filed Oct. 15, 1935. [23]

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[Title of Court and Cause.]

ORDER.

This cause coming on at this time for hearing upon the application of the defendant Inland Power & Light Company, a corporation, for an extension of time within which to prepare, serve and tender for settlement its bill of exceptions in this action, and it appearing to the Court from the written stipulation on file in this cause that the parties hereto have stipulated that the time may be extended to and including the 6th day of January, 1936;

NOW, THEREFORE, IT IS BY THE COURT ORDERED that the time within which defendant shall have to prepare and serve, and tender for settlement, its bill of exceptions in this action, be, and is hereby extended to and including the 6th day of January, 1936.

Done in open court this 15 day of October, 1935.

EDWARD E. CUSHMAN
Judge

[Endorsed]: Filed Oct. 15, 1935. [24]

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[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated by and between the parties hereto, by their attorneys of record herein, that the defendant's time be extended to and including the third day of February, 1936, within which to present, amend, file, settle and/or otherwise prepare bill of exceptions herein on appeal, and that without other or further notice an order may be entered herein in conformity with this stipulation.

It is further stipulated that by order of the above entitled Court, and without notice, the present term of the above entitled Court may be extended and carried over into and to include all of the present term and such further time as may be necessary for the purpose of permitting and allowing defendant to perfect an appeal herein, and to do all acts and things necessary therefor, including all matters pertaining to defendant's bill of exceptions herein.

Dated this 19th day of December, 1935.

BEN ANDERSON
Of Attorneys for Plaintiff
HENRY S. GRAY
Of Attorneys for Defendant.

[Endorsed]: Filed Dec. 23, 1935. [25]

[Title of Court and Cause.]

ORDER.

THIS CAUSE coming on at this time for hearing upon the application of the defendant Inland Power & Light Company a corporation, for an extension of time within which to prepare, serve and tender for settlement its bill of exceptions in this action, and it appearing to the Court from the written stipulation on file in this cause that the parties hereto have stipulated that the time may be extended to and including the 3rd day of February, 1936;

NOW, THEREFORE, IT IS BY THE COURT ORDERED that the time within which defendant shall have to prepare and serve, and tender for settlement, its bill of exceptions in this action, be, and is hereby extended to and including the 4th day of February, 1936.

Done in open court this 23rd day of December, 1935.

EDWARD E. CUSHMAN
Judge

[Endorsed]: Filed Dec. 23, 1935. [26]

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[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable E. E. Cushman, District Judge of the above entitled court:

NOW COMES Inland Power & Light Company, a corporation, the above named defendant, by its

attorneys of record herein, and respectively shows that on the 8th day of October, 1935, a jury, duly empanelled, rendered a verdict in the sum of Four Thousand Dollars ($4,000.00) against said defendant, the petitioner herein, and in favor of Fay M. Grieger and Mary Lois Grieger, the plaintiffs herein, and that upon said verdict a final judgment was on the 25th day of November, A. D. 1935, entered herein against said defendant.

That your petitioner, feeling itself aggrieved by the said judgment entered herein as aforesaid, hereby petitions the Court for an order, allowing it to appeal to the Circuit Court of Appeals of the United States for the Ninth Judicial Circuit, pursuant to the laws of the United States in such case made and provided, for the reasons specified in its assignment of errors filed concurrently herewith, and that citation should issue as provided by law, and that the transcript of the record in said cause, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Judicial Circuit.

WHEREFORE, premises considered, your petitioner prays that an appeal in its behalf to the United States Circuit Court of Appeals as aforesaid, sitting in San Francisco in said circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be [27] made and entered herein that citation be issued as provided by law, and that the transcript of the record herein, duly authenticated, be sent to the United States Circuit Court of Appeals for the

Ninth Judicial Circuit, and fixing the amount of security to be given by defendant to said plaintiffs, conditioned as the law directs, and that, upon the giving of such bond as may be required, all further proceedings herein may be stayed and suspended until the determination of said appeal by said Circuit Court of Appeals.

ELLIS & EVANS
JOHN A. LAING and
HENRY S. GRAY
Attorneys for Defendant

[Service.]

[Endorsed]: Filed Jan. 18, 1936. [28]

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[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

NOW COMES Inland Power & Light Company, a corporation, defendant in the above numbered and entitled action, and, in connection with its petition for an order allowing an appeal in said action, assigns the following errors which said defendant avers occurred upon the trial thereof, and upon which it relies to reverse the judgment entered herein, as appears of record:

I.

That the Court erred in denying said defendant's motion for non-suit, made at the close of the plaintiff's case, upon the several grounds that: (1) the plaintiffs had wholly failed to prove any actionable

negligence; (2) that the evidence conclusively showed that an unprecedented flood caused the damage to plaintiffs' property, regardless of any conduct of the defendant; (3) that the evidence affirmatively showed reasonable care by the defendant; and (4) that any verdict rendered on the evidence would be purely speculative and without basis for computation. (Transcript of Testimony, 419, 420.) (Bill of Exceptions, 110, 111.)

II.

That the Court erred in entering judgment on the verdict herein, in that said verdict was against law and unsupported by the evidence.

III.

That the Court erred in denying said defendant's motion for a new trial herein, in that the Court thereby erred as a matter of law, and failed [29] to exercise a sound judicial discretion.

WHEREFORE said defendant prays that the judgment of said Court be reversed.

ELLIS & EVANS
JOHN A. LAING and
HENRY S. GRAY
Attorneys for Defendant

[Service.]

[Endorsed]: Filed Jan. 18, 1936. [30]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

It appearing that the defendant in the above entitled cause has filed in this court a petition for an appeal from the final judgment herein dated and entered November 25, 1935, together with an assignment of errors and prayer for reversal;

It is hereby ORDERED that an appeal as prayed for in said petition be, and it is hereby, allowed, and that Citation be issued as provided by law, and that a transcript of the record herein, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that the bond on appeal, conditioned as required by law, is hereby fixed in the sum of Six Thousand Dollars ($6,000.00), and that said bond shall operate as a supersedeas and cost bond, and shall stay and suspend all further proceedings in this court until the determination of said appeal.

Dated this 18th day of January, 1936.

EDWARD E. CUSHMAN
District Judge.

[Endorsed]: Filed Jan. 18, 1936. [31]

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[Title of Court and Cause.]

COST BOND ON APPEAL AND SUPERSEDEAS.

KNOW ALL MEN BY THESE PRESENTS that we, INLAND POWER & LIGHT COM-

PANY, a corporation, as Principal, and NEW YORK CASUALTY COMPANY, a corporation organized and existing under and pursuant to the laws of the State of New York, and duly licensed in the State of Washington to transact the business of surety and to execute and deliver bonds of this character and amount therein, as Surety, are held and firmly bound unto Fay M. Grieger and Mary Lois Grieger, the plaintiffs in the above entitled action, in the full and just sum of Six Thousand Dollars ($6,000) to be paid to the said Fay M. Grieger and Mary Lois Grieger, their executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our respective successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, lately at a regular term of the District Court of the United States for the Western District of Washington, Southern Division, sitting at Tacoma in said district, in an action pending in said court between Fay M. Grieger and Mary Lois Grieger, as plaintiffs, and Inland Power & Light Company, a corporation, as defendant, Cause No. 8352 on the law docket of said court, final judgment was rendered on the 25th day of November, 1935, against said Inland Power & Light Company for the sum of Four Thousand Dollars ($4,000.00), with interest thereon at the rate of six per cent (6%) per annum from the 8th day of October, 1935, and said Inland Power & Light Company, a corporation, has been allowed an appeal to

reverse the judgment [32] of said Court in the aforesaid action and a citation directed to the said Fay M. Grieger and Mary Lois Grieger, appellees, citing them to be and appear before the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden at San Francisco in the State of California, according to law, within thirty (30) days from the date thereof;

NOW the condition of the above obligation is such, that if the said Inland Power & Light Company shall prosecute its appeal to effect and answer all damages, costs and interests if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

INLAND POWER & LIGHT COMPANY, Principal
[Seal] By HENRY S. GRAY
President
Attest: J. G. HAWKINS
Secretary

NEW YORK CASUALTY COMPANY, Surety
[Seal] By A. E. KRULL
Resident Vice President
Attest: J. A. VESTAL
Resident Assistant Secretary

The foregoing bond is hereby approved this the 20th day of Jan., A. D. 1936.

EDWARD E. CUSHMAN
District Judge [33]

[Verifications.]

[Endorsed]: Filed Jan. 20, 1936. [35]

[Title of Court and Cause.]

## STIPULATION FOR ORDER EXTENDING TERM.

It is hereby stipulated and agreed by and between the parties to the above entitled action, by their attorneys of record therein, that an order may be made and entered herein by the above entitled court, or by the Judge thereof, without notice, extending the present term of the above entitled court to and including Monday, the 5th day of March, 1936, for the purpose of permitting and allowing defendant to make any and all changes in, amendments of or additions to the bill of exceptions served herein on January 16, 1936, and thereafter lodged with the Clerk of the above entitled court, which may be ordered or required by the Judge of said court; and for the further purpose of enabling the Clerk of said court to prepare, certify, and lodge with the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit a transcript of the record in said cause, and for the performance of any and all matters incidental to the appeal of said cause to said Circuit Court of Appeals.

Dated this 24th day of January, 1936.

BEN ANDERSON
Of Attorneys for Plaintiffs
HENRY S. GRAY
Of Attorneys for Defendant

[Endorsed]: Filed Jan. 27, 1936. [36]

[Title of Court and Cause.]

STIPULATION FOR TRANSMISSION OF ORIGINAL EXHIBITS.

IT IS HEREBY STIPULATED between the parties hereto, through their respective undersigned attorneys of record, that all of the original exhibits herein, consisting of plaintiff's Exhibits numbers 1 to 10, inclusive, and 13 to 19, inclusive, and defendant's Exhibits numbers A-1 and A-2, shall be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 29th day of January, 1936.

Signed BEN ANDERSON
Attorney for Plaintiffs
ELLIS & EVANS
HENRY S. GRAY
Attorneys for Defendant.

[Endorsed]: Filed Feb. 1, 1936. [37]

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[Title of Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS.

Upon defendant's motion the Court being advised IT IS HEREBY ORDERED that all the original exhibits mentioned in the stipulation, this day filed to-wit: Plaintiff's Exhibits numbers 1 to 10, inclusive, and 13 to 19, inclusive, and Defendant's Exhibits numbers A-1 and A-2, shall be forwarded

by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Tacoma, Washington, this 1st day of February, 1936.

EDWARD E. CUSHMAN
United States District Judge.

Unsigned copy hereof received and form approved, January 29, 1936.

BEN ANDERSON
Attorney for Plaintiffs.

[Endorsed]: Filed Feb. 1, 1936. [38]

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[Title of Court and Cause.]

MOTION FOR EXTENSION OF TERM.

Comes now the defendant and moves the Court to retain jurisdiction over this cause beyond the expiration of the present term (July term, 1935) for the purpose of settling a bill of exceptions herein and for any and all other purposes in connection with the appeal to the Circuit Court of Appeals for the Ninth Circuit which has heretofore been allowed this defendant, and to that end to extend the present term of this court as to this cause throughout the next succeeding term of court, or until a day certain as may be fixed by the court.

This motion is based upon the records and files in this cause.

ELLIS & EVANS
HENRY S. GRAY
Attorneys for Defendant.

[Endorsed]: Filed Feb. 4, 1936. [39]

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[Title of Court and Cause.]

ORDER EXTENDING TERM.

The defendant's proposed bill of exceptions having been heretofore presented to this court for certification and being now under consideration by the court, and the defendant having moved the court to retain jurisdiction of this cause beyond the expiration of the present term, to-wit, the July term of 1935.

IT IS ORDERED that this Court will retain jurisdiction over this cause beyond the expiration of the present term of this court for all purposes and particularly for the purpose of settling a bill of exceptions herein, and that the present term of this court is as to this cause extended for thirty days from this date.

Done in Open Court this 4th day of February, 1936.

EDWARD E. CUSHMAN
Judge of the District Court.

[Endorsed]: Filed Feb. 4, 1936. [40]

[Title of Court and Cause.]

WAIVER OF OBJECTIONS AND CONSENT TO SETTLEMENT OF BILL OF EXCEPTIONS.

Come now the plaintiffs by the undersigned, one of their attorneys of record herein, and waive any and all objections or amendments to the bill of exceptions as prepared and proposed by the defendant, which bill of exceptions was served on plaintiffs' attorneys on January 16, 1936 and lodged with the Clerk of the above entitled court on January 18, 1936, and consent that said bill of exceptions, in the form proposed or as hereafter modified or amended by order of the Judge of said court, may be settled, allowed and certified by said Judge, without notice, and that the original exhibits be not inserted in or attached to said bill of exceptions, it having been heretofore stipulated that the originals of all the exhibits should be transmitted to the Circuit Court of Appeals for the Ninth Circuit, and that the bill of exceptions when certified may be filed with the Clerk of the above entitled court, plaintiffs hereby expressly waiving any and all notice of the time of settlement of said bill of exceptions.

It is intended that this waiver and consent shall supersede the waiver and consent heretofore executed under date of January 24, 1936 and filed with the Clerk of the above entitled Court on January 27, 1936.

Dated this 6th day of February, 1936.

WM. P. LORD
BEN ANDERSON
Attorneys for Plaintiffs.

[Endorsed]: Filed Feb. 8, 1936. [41]

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[Title of Court and Cause.]

## BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 1st day of October, 1935, at 10 o'clock A. M., the above entitled cause came on for trial before Honorable E. E. Cushman, District Judge; William P. Lord and Ben Anderson, of Portland, Oregon, appearing as attorneys for the plaintiffs, and Robert E. Evans of the firm of Ellis & Evans, of Tacoma, Washington, and Henry S. Gray of Portland, Oregon, appearing for the defendant; and the jury to try the issues having been duly empaneled:

Whereupon the following proceedings were had:

### MR. SCHMIDT,

called as a witness for the plaintiffs, being first duly sworn, testified as follows:

(Direct Examination by Mr. Lord)

I am an employee of the defendant, Inland Power & Light Company, and have been employed since October, 1931. I am Mr. Shore's assistant and take care of maintenance on the project. I reside right

(Testimony of Mr. Schmidt.)

in the village at Ariel, in one of the houses there, and about 600 or 700 feet from the dam. I was there during the month of December, 1933, and had been employed there for two years before. I was there during construction of the dam. I couldn't tell you just the month the dam was completed but it was completed in 1931. Power was started to be generated in 1931.

On the night of December 19, 1933, I was working for the company. I could not tell you just where I was; I was in and about the damsite and had been there during the entire month. The company maintains a water gauge showing the height of the water of the lake. I have charge of that work partially. [42]

> "Q. And do you remember independent of any notations the height of the water at the damsite during the month of—up until the—at the first of the month?
>
> A. No, sir. We have log books that takes care of that. We don't try to remember it."

I do not know of my own knowledge the height of the water at the dam at the first of December. I do not know what it was on the 20th of December, 1933. I do not know how near the top it was at that date. I know the height of the dam. It is elevation 240 above the bed of the stream; that means feet.

I was subpoenaed to produce a blueprint of the map (dam). I don't have access to any of those

(Testimony of Mr. Schmidt.)

things you asked me to produce, but they will be here, I think. I have told the company about them and I think they will be here. Mr. Shore has charge of such documents. Mr. Griswald is the consulting engineer, I think with the company.

With respect to keeping a memorandum of the height of the water in the dam, that is not done by me or under my direction. They tell me when to open the gates of the dam from the power house. I have no charge of that at all. We maintain a log. The operator in charge of the shift makes the entries in that log. I am not one of those operators. As to my subpoena to produce the log, I have told Mr. Shore to produce them and he is going to produce them. Mr. Shore is here in the court room at the present time.

As to my knowledge of the depth of the waters impounded by the dam, I know the height of the dam. I don't know just the lay of the lands back of the dam. I do not know what the average depth of the dam is. The greatest depth of the dam is over 200 feet. I do not know offhand how long the dam is. I was about the dam on the 20th of December, 1933. The dam has five gates. They are located right side by side. In addition to the five gates there is [43] no other means of water escaping. There is an intake to the machine. I think it is 15 feet in diameter. The machine I think was running on the 20th day of December, 1933. The intake is 15 feet in diameter and is located at the

(Testimony of Mr. Schmidt.)

bottom of the dam, on elevation 60 to the center of it. As to whether it takes the full 15 feet of water when it is opened, that is according to the amount of the load we carry. That water can be controlled. I do not know whether the full capacity was on December 20, 1933. If the log books were here we could refresh my memory on that point. As to whether I saw the log books kept, I know they are kept. None of the information that went into the log books was furnished by me.

The height of the water in the dam is recorded automatically at the power house. I take care of the chart on the top of the dam but I turn it in every week. That is the only chart I have. As to whether that is done by machinery, the one on the dam is done by float. Well, if you call that machinery. Then it records it in the power house electrically. I think Mr. Shore has got those books here.

As to whether I transferred to the officers and agents of the Inland Power & Light Company any readings from this mechanism that has been referred to as a record of the height of the water in the dam, yes, I did.

> "Q. Mr. Schmidt, do you recall of your own knowledge, independent of any notations that you may have made in the log book, or any dates that you may have taken down for future reference, whether or not prior to December 21st, 1933—in and about—say the 15th of Decem-

(Testimony of Mr. Schmidt.)

ber, 1933, to the 21st of December, 1933, whether any—whether the water in the dam was so high that it went over the top of the dam."

"A. No, I never seen it go over the top of the dam."

I do not know how near the top of the dam I saw the water during [44] that period of time. As to whether I observed with my own eyes the height of the water in the dam between the 15th of December, 1933 and the 21st of December, 1933, I have seen water, certainly. I do not know how near the top of the dam it was, starting on the first date named. I do not know how near it was to the top of the dam on the 15th day of December, or any succeeding day until the 21st day of December. The power house or the power machinery was in operation on the 20th of December, 1933. I do not know whether it was in operation the 21st; I won't answer that; I don't know.

I knew about everything electrical by way of maintenance of the plant at the Ariel dam. I am familiar with the flood gates. I do not know what the condition of the flood gates was, what position they were in on the 15th day of December, 1933. I know they were open during the 15th of December and the 21st of December, 1933, but I don't know how far they were open. I opened them as I am ordered to open them from the power house. I don't know just the time or the height. I opened

(Testimony of Mr. Schmidt.)

them different every time they asked me to so I couldn't remember that. I am not able to say the amount that I did open them, how much escapement of water was per minute, not at intervals; I don't know. I know whether or not the gates were fully opened on the 21st day of December, 1933; they were opened fully, yes. The last opening, when they were fully opened, was about midnight. I couldn't tell you how long they remained open because I didn't have nothing to do with it after that time. I wasn't there, so I couldn't tell you of my own knowledge how long they remained open.

I was in the power house, working. I started to work in the power house the next morning, after the gates were opened. The water was still coming through the gates; the power was off. The power went off right after I opened the gates all the way; I don't know how long it remained off. I don't remember whether it remained off one day or not; I don't know. I don't know just when the power came on; I wouldn't say because I don't know. As to whether it was more than one day, I wouldn't say because I don't know, I tell you. It might have been one day. I mean to say that I can't remember. I [45] can't remember whether it was off the period of one day, twenty-four hours, or not. The flood gates are opened and closed electrically. The electricity is secured from the power house. I don't think there is any other hook-up with electricity by any other company outside of the In-

(Testimony of Mr. Schmidt.)

land Power & Light Company; there might be. I don't know whether it is connected up with the Portland Power Company.

Thereupon, Mr. Martin, a juror, inquired whether the witness answered the last question "yes" or "no"; and the witness answered, "I didn't know."

Five of the flood gates were open. There is no spillway there in addition to the five flood gates. The spillway is the only chute at the right side of the dam structure that I know of. That is where the water goes to from the flood gates. There is a way of opening and closing that. The five gates will push the water down that spillway. As to what the height of the water in the dam was at the time I opened the gates, I do not know. The water was approximately within three feet of the top of the dam. I said approximately three feet; I didn't say accurately. That was about midnight.

The location of the power house with reference to the spillway, is on the opposite side of the river. The spillway, the chute of the spillway, turns the water downstream. It turns it downstream from the dam to the west. The water then goes down the Lewis River. The spillway is not in a direct line with the power house. It is a couple of hundred feet off, I should judge. As to my knowing the course of the Lewis River after it leaves the dam, it flows through Woodland, I know that. As to whether or not it leaves the river in a sort of a

(Testimony of Mr. Schmidt.)

gorge, well, I don't know. Right below the spillway there is no gorge. I don't know how far below the spillway the gorge is; I never went down the river. I know where the bed of the Lewis River is as the water leaves the spillway in the power house; yes, I know where it is. As to what sort of banks there are on the Lewis River at that point, say 150 feet to 200 feet down, they are rock and dirt, I guess. On [46] the Cowlitz side I should judge they are around 40 feet high, and on the Clark County side higher; I don't know just how high. As to whether I would estimate it as being 40 feet, I would think so, 30 or 40 feet; yes, I would say 40 foot. It is not the fact that it is nearer 200 feet, on the Cowlitz side. When I speak of the Cowlitz side, I mean Cowlitz County. As to whether that is the west side of the river,—it is on the north side, isn't it? The river flows east and west, so the banks has got to be on the north and south. The river is a couple of hundred feet wide below the spillway. It is not narrow at all right below the spillway. I don't know where it does narrow at. I never been down the river; I am no fisherman.

As to when I started to work at the power house, so that I didn't know how long the gates remained open—well, I think I went to work at 8 o'clock the next morning after the flood; I generally go to work at eight. As to what work I did,—I did all the work that needed to be done. The work that had to be done was cleaning and fixing up the

(Testimony of Mr. Schmidt.)

equipment. The power was not running then. I don't know just how long I worked there. I worked until we got the machines started again; I don't know when that happened. I worked all that day. I recall that eventually the machinery of the power house was started up. We made a new connection instead of using the power generated by the Ariel dam. That was the company's power, but we got it from our power lines up in the switch yard; they were our own lines in the switch yards. That power was generated from another plant; I don't know what plant it was generated from. They were tied in together; I couldn't tell you just which plant we got it from; I do not know which power house it came from. We do not have any other plants on the Lewis River. The nearest plant to this plant is Portland, I think. As to whether we got this power then from Portland, I don't know; they are all tied in together; you get it from all over.

"Q. Now, until this new power was secured, there was no way of closing those gates, was there? [47]

A. Yes, sir.

Q. How was there?

A. By hand.

Q. Was that done?

A. It could have been done, I wasn't there after twelve o'clock at night."

I wasn't there after 12 o'clock of the night of the flood. As to whether they had been closed up

(Testimony of Mr. Schmidt.)
until twelve o'clock Monday—they could have been closed by power up until that time when I left. As to whether these gates were closed by power or by hand, you can close them either way. As to how they were closed, well, I closed them by power, previous to 12 o'clock that night, at intervals. I opened them wide open at around midnight; I wouldn't say just the time. The next time they were closed, I don't know whether they were closed by hand or by power.

On Cross-Examination by Mr. Evans,
of attorneys for defendant, the witness Schmidt testified as follows:

I should judge the high water began to come in the Lewis River there four or five days before the 21st of December. I had had occasion then to operate these gates. The gates are the only outlet except the water which comes down through the penstock. If I close the gates, then the water flowing into the lake raises the level of the lake. We use these gates to control that level. I could not say just how long before the evening of this Thursday, December 21st, I started opening the gates,—five or six days, perhaps. The company has the record of the exact opening. It is all on record, when I was told to open them.

If the water kept coming up I would open another gate. That would run along for some little time, and then I would open another gate. They

(Testimony of Mr. Schmidt.)

were not all opened just at once. They were opened gradually, as the water increased and the rain, and the flood increased. The last gate was the large one. That had been opened for some hours, all but about six feet, something [48] like that. Finally, when the storm kept raising, at midnight I opened it wide. The company has records of all those gate operations. Those records all show what gate was opened. The records will show which gates were opened, when opened and how far.

On Redirect Examination by Mr. Lord, one of the plaintiff's attorneys, the witness Schmidt testified further as follows:

I did not myself keep those records. I did not see those entries made myself; I was up on the dam when they were making them; maybe in the power house.

> "Q. So, when you say the records would show when the gates are opened and when they are closed, you are only saying that in the usual course of business those notations would be made?
>
> A. No, I read the log book every morning, and I know the records are made, and I know it was made, but I don't keep track of the minutes in the opening."

I am not able to say now when the gates were opened prior to the first of December. I could not tell you the extent. I am not able to say the height of the water during that period.

JACK WILSON,

called as a witness for the plaintiffs, bein first duly sworn, testified as follows:

Direct Examination by Mr. Lord.

My name is Jack Wilson. I live five miles above the dam on the Cowlitz side. I live approximately about three-quarters of a mile, straight line, from what is known as Lake Merwin. I was living there in the year 1933. I was not employed that year; nothing at all in the way of employment. As to whether I had no occasion to go up and down the highway; I was just scouting around trying to find a job if there was any. I follow the work of timber falling. I was scouting around to find a job in December, 1933. There is no highways leading along the bank of the Lewis River between my house, my [49] home, and the dam. The road is north of us, probably about 700 feet. It is possible to see the lake from some parts of the highway. It is possible to see the dam from the highway, but you cannot tell just the exact distance, how full or how low. You are too far off. From the distance I live from the lake you cannot see it well enough to know whether the water is high or whether it is low.

I did not at any time see the height of the water in the lake so I would know whether the lake was full or partially full during the month of October, 1933. I was not down at the lake at any time in November, 1933. During the month of November

(Testimony of Jack Wilson.)

I did not notice the state of the water with reference to the top of the dam. I do not know the state of the water as to its height during the month of December at any time prior to the night of the 21st day of December, 1933.

I recall talking to you on Monday last week; talking to you and Mr. Grieger.

"Q. Do you recall telling us that in the afternoon of that day, what day was it you was there, Thursday, wasn't it?

A. Somewhere about there.

Q. Or Friday and you remember telling us that you were up and down the road, running along the side of the Lake time and again, and you noticed that that Lake was clear full pretty near to the top?"

"A. On the next day I went to LaCenter, and stayed there until the next evening, and was over town when the water came up."

I don't know the date of it but it was on Wednesday. As to whether I observed it on that day, on the 20th, I don't know whether it is the 20th, it was right there close somewhere. As to whether in fact I told you on that day that I noticed the water high,—it was pretty near to the top of the gates, [50] but probably looked like three or four feet, only it was so far from the road you couldn't tell, to be exact.

The next day about noon I went down to La Center, but I went around the head of the lake. I

(Testimony of Jack Wilson.)

went down the highway leading to Woodland, but around through the Clark County side. I was not able to see the condition of the water in the Lewis River below the dam. The closest I was was when I crossed the Yale Bridge at the head of the lake. In other words, I went up the Lewis River instead of going down, and crossed at Yale, about 10 or 11 miles from the dam. The dam floods up beyond Yale. There is about a 400 foot bridge there. As to the state of the water as I crossed over that bridge, you can't tell up there. It is way up there at the head of it; no current; it is dead water.

The bridge was quite high above the water; I don't know how high; about 60 or 70 feet, I imagine. The water underneath the bridge was muddy. It was not running. It is still water. I do not know how much further up the river the Lewis River extends beyond the bridge. The bridge is about 400 feet long. I had no difficulty in getting over the bridge. That was on Thursday, right after dinner; probably about one or one-thirty. I was over at Woodland Thursday night. I was over there the rest of the night from about five in the evening. I was up all night.

I was in a restaurant in the Town of Woodland from about five until a quarter of eight. It was raining. It had been raining several days. The Lewis River runs near the Town of Woodland. In the upper end it is probably twelve or fourteen hundred feet from the restaurant. There is one road leading

(Testimony of Jack Wilson.)

out of Woodland each way. There is one road goes up along the banks of the Lewis River, the other one goes south.

That one leads you across the river. I don't know the approximate height of the banks of the Lewis River at Woodland. I came into Woodland on the south road. That took me across the bridge, the Pacific Highway bridge. [51] That is the one that turns by the Samatta Auto Camp. I noticed the Lewis River as I crossed over it. I don't know exactly the height of the water at that time but it was getting rather high. When I got down there off the approach of the bridge,—I was not afoot; I was traveling in a car. I know where those restaurants are down there. I stopped at the first one on the north end of the bridge. That was Henry's.

I stopped there until a quarter to eight. I did not go to Flora's across the street. That is what I call Woodland. I was not down at the part of the town where the business section is, the banks, etc. There was water in the streets then in the lower part of town. That is the way you turn to the left off of the highway. I left Henry's place about a quarter to eight and started north on the highway. When I say north I mean going toward Tacoma. As to how far I drove, oh, I probably got up the road probably about 3000 feet. That took me to Macky's. The road gradually turns from the river there. As to the condition of the highway then, it was kind of wet when I got there.

(Testimony of Jack Wilson.)

The banks of the Lewis River were overflowing then. I stalled the car and I got out, and another fellow and I pushed it to high ground and got it started and took it on down the highway and left it. I did not go back. I went up to a farmhouse and stayed there that night. I went probably a quarter of a mile from town. I went to Connor's farm house. With reference to the Lewis River, Connors live up on the hill on the lefthand side of the highway coming north. I didn't observe any rise of the water after 8:15. It was dark, and I went up to that place and stayed all night. I observed it the next morning. From this farm house you could see that most of the town was covered with water. We was up on a kind of a knoll, and you could see over it. When I am speaking of the town I am referring down there at the county bridge, the highway bridge. I am referring to the lower town where the bank is and the hotel, etc.; all over; down as far as the railroad grade. I did not look up the river at a great distance. [52] I couldn't see very far. As to what time I got up in the morning, I didn't go to bed. No, I never did watch the water rise. I imagine it was probably around 11 o'clock when I got to that house.

As to whether I noticed at that time anything around that called my attention or fixes it in my mind where the water was when I last saw it,—well, I noticed it pouring over the road quite fast, filling in the flats. I couldn't see from where I was

(Testimony of Jack Wilson.)

how high the water was over the road. I started to run my car through it that night, but not the next morning. I imagine the water was high enough to get in the motor of a car. I couldn't tell from where I stalled my car how high the water was the next morning. It was down the highway around the bend, and couldn't see it there. I saw a place that night that fixed in my mind the height of the water, and I saw the same place the next morning. There was a raise in the water. As to how much it had raised, well, from where I was it went up against the railroad grade and couldn't go any farther. It just filled up the flats. That is how it happened to back up on the highway. I would say it raised three feet from 11:15 until the next morning when I got up and saw it. The land in that district is practically level, but the water filled in.

Cross Examination by Mr. Evans

On cross-examination by Mr. Evans, of attorneys for defendant, the witness, Jack Wilson, testified as follows:

When I got to Woodland at 5 o'clock in the afternoon the lower part of the town was then flooded, where the dyke had busted. I know where the Pacific Highway is. That went out the next morning. I don't know of anything that went out on Thursday, but the town was pretty generally flooded on Thursday night. As near as I can remember the town of Woodland was pretty thoroughly flooded about five minutes to eight on Thursday night.

(Testimony of Jack Wilson.)

I went with my car up the Pacific Highway towards Tacoma and stopped just a short distance out of town. I was going up there to see a friend of [53] mine. I did not go through the business part of Woodland with my car. I came in on the highway. The highway doesn't run through there, just the upper end.

Now, up at Yale, that bridge there is across what they call Lake Merwin; that is part of the reservoir from this plant.

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CARL E. INSULL,

called as a witness for the plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Lord

I live at Woodland; my occupation is dairyman. I own a dairy, which is located along the Lewis River bank. I have about 47½ acres. I have lived there since 1922. During that time I have observed the Lewis River. I have lived in the Northwest 29 years, and am familiar with the stream conditions during the entire year. I have been familiar with the so-called Ariel dam since it was built. I knew the river before it was built. I know something about freshets that might occur in the river, as to how great they were. As to whether there were many freshets in the river, there was one freshet in the Lewis River in 1917. During the period that I lived there I saw freshets before 1933. Since I moved

(Testimony of Carl E. Insull.)

there, there was one just about Thanksgiving eve. I don't remember exactly if it was 1925 or 1926, I don't remember just exactly, but I know it was Thanksgiving eve of those years.

As to my knowledge of the height of the water in that freshet in 1926, or Thanksgiving time, with respect to filling up the channel and such matters, and as to how high the water went,—it went over the Ariel highway about 400 feet to my house and north and filled my place something around 37 or 38 acres. It went over the top of my land.

I know the land owned by Mr. and Mrs. Grieger; I know their farm well. I did not see the height of the water up there in 1926 along their property. [54]

I was right on my farm with my family and eight children. I have lived there all the time since I moved on that property. I recall the condition of the weather in 1933, and up until the 21st of December, 1933. It rained very heavy; the rain during that period was much greater than usual. As to what period of time it was the greatest or heaviest, I would say Sunday the 17th of December, 1933, and Monday and Tuesday and a Wednesday it rained very heavy.

Tuesday was the 19th of December; I recall the condition of the weather on that day. I live mostly on the Lewis River banks, and I watered my cattle in the river. On Sunday, December 17th, I watered my cattle in the forenoon, but in the afternoon and

(Testimony of Carl E. Insull.)

after that and Monday I can't water it in the river; the river is very low at that time. I watered my cattle usually in the river. I keep my cattle in the barn which is located on the north side of the north bank of the river. My barn is separated from the river by the highway. My barn is about a thousand feet north of the river bank, highway between the river and the barn, and you see my house about 800 feet or so off up the river, is along the highway, about 50 or 60 feet off the highway north.

I know Mr. Grieger's property. I have been on it. Mr. Grieger's land is along the south bank of the Lewis River but on the Clark County side, something about 3½ or 4 miles up the stream, above my place. As to whether there are any streams on either the north or south side, between my place and Grieger's place, that run into the Lewis River, I haven't seen that. As to the height of the water on Sunday, the 17th, between the upper end of Grieger's place and my place, the river is quite high up, but after noon it went down, the river went down almost below the normal. Mr. Grieger's property is below the dam, and my property is below the dam.

I observed the condition of the water on the 18th, Monday. I watered my cattle over at the river. It is low enough to drive to the river. I watered [55] my cattle right on the main stream off of Lewis River. It is a channel, you know, where I watered my cattle. The river was inside of the channel

(Testimony of Carl E. Insull.)

then. During the night of the 18th it started to rain a little towards evening, after I watered my cattle. On the morning of the 19th it is still the same condition. It started to raise a little toward evening. During the daytime of the 19th the water in the river was not all over the banks, but just in some places, in the lower part of the side channels.

I know the highway going up the north side of the Lewis River. That highway follows up the river almost close to the bank. Of course some places it is a little off, but almost close to the banks. I did not go up the river on the 19th, and on the 20th I couldn't; the water is high. In the morning on the 20th I went to the town of Woodland, and the river was very close to the highway. I stayed there till evening; at four o'clock I came back. It is more higher, very close to the pavement in some places, the main Pacific Highway, and my house, so then I brought up a stick to the front of my house to check if it raised or stand still. I put the stick out in the evening about 5 o'clock.

I observed the condition of the rise and fall of the water, and observed it was raising. As to how much of a stick I put out,—I put out a cedar stick a couple of inches round, and I drived it in, just outside of the edge of my fence, over toward the river, about a foot or so. The stick was about three feet long. I continued to watch that stick, and continued to watch the rise or the fall of the water. The water was raising till I went to bed. I did not take it very seriously. It was raising kind of slow,

(Testimony of Carl E. Insull.)

so my wife is very nervous. She start up when I asleep, and see that stick,—that is the night of 20th that I am talking about. On the night of the 20th I observed the current is very strong.

I stayed in bed all night until 4 o'clock in the morning. At 4 o'clock in the morning I am drowned by the water. I could not get out of [56] the house any more; at 4 o'clock Thursday morning.

I did not go up to the dam between the 19th and the 20th; I couldn't go any more. I had been up to the dam during the month of December; about the 10th. As to whether I observed the height of the water in the dam at that time,—I stopped the car, I did not go into it. I stopped the car on the highway, and I see the lake is full.

I have had experience with power plants, and artificial ponds, and reservoirs and such like, since I am 16 years old until 1914. I observed the condition of the lake at that time.

The surplus water was let out of the Ariel dam by the spillway. I had been there before that, you know, a good many times. The lake was almost full at that time, the 10th of December. It was about a couple or three feet from the top. At that time one of the gates or spillways was a little bit open, at the north side of the dam. The other gates are locked or shut up.

I slept all night during the night of the 20th till 4 o'clock in the morning on the 21st. Then I observed the river, the water was around my house;

(Testimony of Carl E. Insull.)

I couldn't get out any more. My measuring stick was out in the water; I could not see it. The water was over the top of the stick and over the fence. I could not see it—I could not see anything, except a terrible stream, and the foam, and the driftwood. The water is traveling so terrible, you know. I cannot tell just how fast.

I observed the current in the river on the night of the 20th, at 5 o'clock on the evening of the 20th, when I brought that stick up. I noticed it again in the morning on the 21st, when daylight came on, and it is a terrible foam, and the current, and when little daylight came out you can see current is so swift, nobody could stand in it. Comparing the two currents from the nighttime at 5 o'clock, and in the morning when the light came on, it is swifter in the morning. In the evening, December 21st, it is higher, more [57] higher. Between 12 and 1 o'clock in the morning on the 21st it stands still, is the highest point. I am now speaking of Friday morning, the 22nd. As to what time it was the highest on Friday, the 22nd of December—to 12 and 1 in the morning, midnight. Off that point it starts a little slowing down.

It started to go down the 22nd of December. It was the highest at 1 o'clock in the morning on the 22nd of December.

I know Mrs. Grieger's property. I know and am familiar with other farm lands of a like type around

(Testimony of Carl E. Insull.)

in the valley thereabouts. The lands there are used mostly for agricultural purposes, particularly dairying.

I know about the type of land that is adjacent to the Lewis River. It is land of different types and different kinds. Sandy loam and silty loam, and heavy and black clay, and it partly is light sand, sandy, but light sandy land is not very much, but mostly the sandy loam and silt, is the most of the land. As to the width of the Lewis River valley and where it starts out to have low lands,—it starts out about five miles below the Ariel dam, there is kind of a narrow funnel shape and then it starts out to spread out and spread out before it gets to the Columbia banks; then it is very wide, which contains something around 8,000 acres of level land. Mr. Grieger's land was composed of a kind of silty loam.

I know the reasonable value of the type of land owned by Mr. and Mrs. Grieger in the month of December, 1933. I know the type of buildings that were on Mr. Grieger's place. I do not know the approximate cost of the construction of such buildings, or the reasonable value of such buildings, in December, 1933.

I know the general type of dwelling house or houses or barns, and outhouses, that was on this property in December, 1933. I did not know exactly [58] the farm as a whole, that is the different portions of the farm, what was cleared, what was pastured, etc., before the flood. I know the value of the

(Testimony of Carl E. Insull.)
entire property of the farm prior to the flood of 1933, to some extent.

(Upon Cross-Examination by Mr. Evans, as to his qualifications, the witness, Carl E. Insull, testified as follows:)

I am in the dairy business; I have been in the dairy business since 1914, before that I was an engineer, steam engineering. As to whether I have bought and sold any land in that vicinity in the last 10 years, oh yes, I have bought lots of land and sold lots of land. I bought land in the month of June, 1911.

I bought land in 1919 and 1922; the last I bought at 1925. I have not made any sale since 1925, no, except a little piece it didn't amount to anything. That was sold, just a little lot over (off) my property. I do not know of any sales within a year before or after December 21st, 1933.

Thereupon the Witness Carl E. Insull,

Upon Further Examination by Mr. Lord, testified as follows:)

As to whether I had any interest in any dairy or with the dairy industry around southwestern Washington,—I was the manager of the Cowlitz and Clark Dairy Association about six years ago. The membership of the Clark Dairy Association was over two hundred. The members of that association were farmers; they owned dairy land. I discussed with them the values of their property. I was the chair-

(Testimony of Carl E. Insull.)

man of that dairy association for two and one-half years. I think it was 1926 and 1927 and a half of 1928 that I was manager. I know of some sales of land being made around the valley there in recent years. Before 1929 the sales were made pretty often. I know most all of the farmers around there. As to whether any of those farms there have been sold since 1929,—they change hands, you know, quite often there, but I didn't just pay any attention in particular which was. [59]

As to my opinion on the reasonable market value of the Grieger place prior to the flood of 1933,—land of that type was worth at least some $250 to $300 an acre. I have seen the land since the flood. The place is almost washed away. The buildings is there on some high banks, the lands on that place were mostly low bottom land. The low bottom land is the same as all around, in Woodland; the same kind of land. There was silty land on this place; it is silty loam. The silty loam is all washed away. As to whether there is any soil left there, there is nothing left but the river there now, it is water almost.

I recognize what is depicted in the pictures, photographs, you hand me.

"Mr. EVANS: Mr. Lord, I will admit those pictures were taken on Mr. Grieger's land."

(Thereupon the photographs referred to and marked plaintiffs' exhibits numbered 1 to 7, being seven photographs of the plaintiffs' land, were re-

(Testimony of Carl E. Insull.)

ceived in eveidence and marked "Plaintiffs' Exhibits numbered 1 to 7.)

Those photographs correctly describe the land that has been affected by the water. I do not recall whether the rocks and boulders which I see there were there before.

I know the reasonable market value of the Grieger place after the flood.

(Thereupon Mr. Evans, of attorneys for defendant, cross-examined the witness, Mr. Insull, as to his qualifications, and the witness Insull testified as follows:)

I was on the Grieger place two or three times after the flood. I been there right after the flood first time, to look over the land. I didn't ask him how many acres he had; I did not know how many acres there was on the place. As to how many acres there around the place now, house and barn,—just a little corner left. I don't know how many acres are around the house and barn now, left untouched.

[60]

As to the reasonable market value of this place, there is no value of any kind of land today, not my place or anybody else's, no value after the flood. I cannot give it away, my place.

(Upon Cross-Examination by Mr. Evans, of attorneys for defendant, the witness, Carl E. Insull, testified as follows:)

(Testimony of Carl E. Insull.)

The soil on the Grieger land is just ordinary silt soil. As to whether the flood waters would have an effect on that,—it is washed away now.

In 1926 my place was flooded. My place lays at about the same elevation as the Grieger property. At that time the waters just covered my place, that is all.

In this 1933 flood I put a stick up on Wednesday night, the 19th. When I got up on the morning of the 20th, at about 4 o'clock, the water was away up over the stick. As to how many feet over the stick,—I could not see anything, no fences or nothing. The water generally over my place there was about 12 to 15 feet. I do not know whether at that time it was the same way over the Grieger place. I saw the Grieger place just about a couple of months before the flood. When I got up on the morning of the 21st, not the 20th, the current is so strong you know, just everything just flying, logs, and the trash; everything went,—hit to the hollows from each side where the current is coming. The current was highest the morning the 22nd, between 12 and 1 o'clock. That is 12 to 1 o'clock on the 22nd; that is for one hour. That is when the flood reached the peak. and that is when the current was the swiftest. After that it was stationary just a few hours; then the flood started slowly to come down. There was the same rush after 1 o'clock, but it just started to come down. It was settling then. As to whether, if there was any damage done it was done by the current, I

(Testimony of Carl E. Insull.)

don't know. At 1 o'clock it started to come down. That is true; when the river went out.

I have not any interest in this law suit, personally. Of course, I have a case of my own against the power company. I expect to bring suit [61] against the same power company for damages growing out of this same flood. I have already signed up a contract to that effect. That was signed right away after the flood. I signed up with my attorney. He is in Portland. His name is William Lord.

As to whether real estate values now at the present time are any higher than they were in 1933,—nobody don't buy land today at Woodland. I don't know about the general market. I don't know anything about the market generally. I have not kept myself advised on the market value for some time; I'm not interested now. I started to buy land in 1911. Since 1929 I didn't pay any attention. I didn't pretend to know the market value since then; only around through my neighbors; just my neighbors. My neighbor is just alongside of me. I sold land to him. I know what land is worth today around, but nobody don't want it any more. Nobody can sell the land below the dam any more.

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GRADY PHILLIPS, called as a witness for plaintiffs, being first duly sworn, testified as follows:

(Direct Examination by Mr. Lord)

I reside at Hayes, about four miles above Woodland on the Lewis River. My property adjoins the

(Testimony of Grady Phillips.)

Lewis River. The house sets back about a quarter of a mile. I have lived there about six years. I was there personally part of the month of December, 1933; the latter part of the month. I follow the occupation of farming, I guess. I was farming this farm at this time. I was there around the 20th of the month. I know the condition of the weather that was occurring; it was raining pretty hard. I could not say exactly how long it has been raining; it has been raining for several days—perhaps 10 days. I don't know, maybe longer than that, I guess. I know the condition of the river on the 20th. I saw it personally. I noticed the river for about 10 days I should judge prior to the 20th, something like that.

Ten days prior to the 20th the condition of the river was up above [62] normal, I would say. It was not above the banks; well, maybe a few days before the 20th—no, I don't remember just when it did start over the bank; sometime I believe before the 20th, though. At the point I viewed the river, it was just slightly over the bank. At that time it was not cutting any land away that I noticed. Mr. Grieger's property adjoins my property on the west. I saw the river running along their place at that time. I saw it practically every day for eight or ten days, until the 21st. Up to the 20th there was not any cutting of the banks of the Lewis River along the Grieger property that was noticeable to me.

(Testimony of Grady Phillips.)

It seemed to me that the water had just started over the banks of the pasture land and the farm land of the Grieger property on the 20th. The river was the same after the 20th. I think it was raining a little more the 20th, or after the 20th—the 21st. I did not notice any noticeable change until the morning of the 22nd, was the first change that I noticed. It raised all right on the 21st. On the morning of the 22nd it was more like an ocean than it was like a river, then. The morning of the 22nd I would say was the first I noticed the river begin to cut. The Grieger property was just washing away. It had just simply cut everything—cut the whole place and washed away down—it looked to be down about eight or ten or twelve feet. It washed down to the gravel or bedrock. I would call the soil on that place a silty loam. I am not a land expert. The silty loam washed away. I could not say exactly how many acres of it were washed away. I should judge 50 or 60 acres probably.

I did notice whether or not any of the other lands below Mr. and Mrs. Grieger's property were cut into. I am acquainted down the river to Woodland is about all. I noticed the land just immediately below Woodland, so I am not very well acquainted with that, but my place to Woodland I am well acquainted with that. I am familiar with the adjoining land to Mr. and Mrs. Grieger's property on the Clark County side. The river passes by that property. Going on down to the next place, the situation

(Testimony of Grady Phillips.)

there is practically the same thing. I know that land. I am familiar with the next farm down, along the Lewis River. [63]

I am not familiar with the lands along on both sides of the Lewis River, before the flood, as to its contour and its condition. I am familiar on the Clark County side. I was familiar with it after the flood.

The series of ranches that start from my place down to the town of Woodland are all adjoining the river. I saw these farm lands between my place and Woodland after the flood.

Cross-Examination by Mr. Evans

As I recall, Thursday was the 21st. I was there the Sunday before. The water was up. There was a freshet, yes. I do not recall that the river was out of its banks very much any place. It was not over the bank on my property where I would observe it. I undoubtedly would have observed the Grieger place that day, Sunday. I do not know whether or not the Grieger place was flooded on the Sunday preceding.

I don't know how high the water was. I saw the river for seven or eight days before the 20th. It seemed to me that the river was over the bank on Wednesday. It would be a hard statement for me to say how much over the bank. I don't recall it being on my farm. It seemed as though it was over the

(Testimony of Grady Phillips.)

Grieger place; yes. I don't know how much of the Grieger place was covered that day. I don't know as a matter of fact whether it went across at all. It seemed to me as though there was water over the bank that day. It wouldn't be perhaps over the farm generally. At my place the banks are fairly high. At my place the banks are about ten feet or more.

I am fairly familiar with the Grieger place. The river comes in pretty straight. There was a jetty right at the back of my place. I do not believe that jetty was on Grieger's property; there might be part of it on his place. I was fairly familiar with the character of the land on the Grieger place. I recall that it was a silty soil; a silty loam, they call it. As to whether it was settlings washed in by the river largely, I couldn't say where [64] it come from. I imagine it was brought in from above. I don't know whether that soil was brought in by former floods and deposited. That is history to me; I don't know; I never had any understanding. I don't know when I first observed the flood condition of the Grieger land; probably the 15th, or prior to that perhaps. I was away from home and came home on account of the water. I don't recall just the date; probably a few days prior to the 15th.

The flood had not been troublesome on the Lewis River prior to the 8th. Other rivers were having some freshets. What brought me home was the slide. There had been an extremely heavy rainfall

(Testimony of Grady Phillips.)

for a considerable period of time, and all of the rivers in that vicinity were more or less on a rampage; they were freshets. I don't know whether the Cowlitz River was away out of its banks. I do not know about the Little Kalama River, just over the ridge from the Lewis. The Lewis River was practically the only river that I know anything about during the flood. It was a slide up near Mt. St. Helens, near the railroad tracks and the Weyerhaeuser Timber Company's land, that brought me home. The track was washed out and they couldn't operate it; the slides pushed it away.

As to whether I was over to the Grieger place after the 15th and before the 22nd, or Friday,—I imagine back and forth. I went to the Grieger place after I got back home until after Friday, the 22nd. I can't just recall the date, but I imagine I was down there every day. I can't say how many times I went to the Grieger place; I don't know. As to any specific time that I went on to the Grieger place before Friday the 22nd,—I went there the 21st. I was there on that day some time before noon. I couldn't remember the time. I didn't have any watch along and wasn't paying any attention to the time. I would say it was between 8 and 10 o'clock, to my best judgment.

I believe that the water was out of the banks of the Lewis River [65] at that time; I don't know. It has been so long ago I just don't remember the date. It was out, it was over the banks, I know, to

(Testimony of Grady Phillips.)

some extent. I believe it was flowing down through the swale on Grieger's place on the 20th where the wash occurred. The wash started practically right west of the jetty, I guess. Beginning at the jetty, the Grieger place was a little lower than my property, and I imagine it was a little bit lower than the surrounding property on Grieger's land.

Just from looking at it I couldn't tell, but after the water was up it showed that it must have been a little bit lower. The place where the wash occurred on the Grieger property was lower than the property on the back of his place. That must be where the water would strike first; that is where it went. I remember the condition of the Grieger place back of the jetty prior to this flood. As to whether it had been washed out there some considerable places back of the jetty prior to this flood,—well, that is characteristic of the rest of the bottom land. There is lower places and higher places, but it was washed, I couldn't say. As to whether there was a very perceptible old wash there back of the jetty,—well, I don't know how; I couldn't say whether it was a wash or what it was. As I say, it is characteristic of the whole country; something had gouged it out down there back of that jetty to a certain extent.

I don't know how late on Wednesday the 20th I was at the Grieger place. I probably spent an hour or so there. I was probably alone. My occasion for going was just looking at the river. Possibly a tenth of Grieger's place, beginning at the jetty, was under

(Testimony of Grady Phillips.)

water when I was there on the morning of the 20th. He has approximately one hundred acres, I understand. I would doubt if there were ten acres under the water at that time. Perhaps eight acres were under water. I have no way of knowing; maybe more or less, I don't know. It seemed to me as though the river was flowing through the swale at that time. The water was there, but not much of a current. As to whether this is an ox-bow that makes a big bend, a kind of [66] a double curve there in the river, well—there is a curve in the river, a slight curve, yes. The river went through and made the wash from the jetty; it just cut off the curve. I do not recall that it had done any cutting on the 20th. I did not look to see. I did not make any close examination for cuts.

I should guess I was there perhaps an hour. From there I went home. I did not observe the river all the afternoon of the 20th; I didn't make it a business to watch the river. It was not out of its banks at my place, I don't believe; it wasn't out of the bank at all. I couldn't say how much higher the ground in my place is than the Grieger place. After the water got up so I could notice it, I could notice it was high, that is all. It wasn't over very much of my place on the 20th. No doubt if it was on Grieger's it must have been on mine. I don't remember whether it was or not. I thought we were talking about Thursday, the 21st. On Thursday the

(Testimony of Grady Phillips.)

water conditions were practically the same as Wednesday. I would not say just the same, but I don't think there was any radical change in the river, as I recall it; nothing to compare with Friday. I was on the Grieger place on Thursday; that was in the morning, as I recall. As near as I remember I went alone. I thought it was Thursday, the day you were speaking of before.

I don't remember any radical change in the water on the Grieger place on Wednesday and Thursday. I was there Wednesday too; I was around the neighborhood there. I don't think I was on the Grieger property Thursday afternoon. That Thursday afternoon I was doing a lot of farm work around the place. My farm may have been under water at that time. Whenever it gets over the Grieger property it gets on a small portion of mine. I don't recall whether there was any more water flowing across my place Thursday afternoon and Thursday evening than there was on Wednesday, particularly. On Thursday night I remained up until perhaps nine o'clock; I don't remember. I don't know what happened in the night then at all. Some of my land was washed away. I have a claim against the Inland Power & Light Company. I [67] am suing them too, through Mr. Lord.

DAVID J. SHORE,

called as a witness for the plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Lord.

My name is David J. Shore. I reside at Ariel dam. I have lived there since before the plant started, five years next February. I am superintendent of the Ariel dam. I have been superintendent for the past five years. A blue print of the plans for the dam are here in the court room; the engineers have them.

As to whether we keep a record of the height of the water in the dam,—we keep an hourly record of the water. That record is kept both by us and by the Geological Survey. The record for the government is independent. I have charge of it. Mr. Schmidt takes that record off and passes it on to me at my desk, and I mail it on to the office and they in turn to the government. Mr. Schmidt was the witness who testified here yesterday. Those records are transmitted to the government, I think in this building, Tacoma. I don't know whether they are in the possession of Mr. Calkins. As to whether that is the man to whom we transmit them, as I said, the transmittal is not directly through me. I have daily log sheets that I send to the office, and I pin this government report on that, and send it to the office, and then transmit it to Tacoma. I do not transmit the record to any particular employee. As to whether I know Mr. Calkins,—I may have met him; there are several government men coming

(Testimony of David J. Shore.)

to us about readings of the weather bureau and water readings. I don't know how long he has been in the office here. I do not know whether he was here during the year 1933. As to whether I kept a record of it for my company during the rainy season of 1933 of the times the flood gates were opened, it is in my log book as far as my record is concerned, the reading of the opening of the flood gates, and the pond, is transmitted with our hourly readings, on the switchboard to the company every hour. As to whether our log book contains the same readings every hour, if we change [68] a spill the log book is changed. The spill is transmitted to the office until the change. The spill is not always open. The spill is according to the stream flow.

As to describing the spillway, or how it acts,—we have five gates; we have a small gate 30 x 10, which is our control gate that can be operated from the power house. The reason of the spill, a machine takes so much water; that is, according to the load of the machine; but when the machine is fully loaded it takes a certain amount of second feet, approximately 3,000 some second feet. Whenever the water continues rising and the machine cannot take it and we have to start in on the spill, we start in with the little gate. When it gets beyond the little gate, the operators report that the little gate is fully open. Then we have to go to the dam, and there is a push button motor on No. 2 gate,—that is the large gate, that is 30 x 39. We open that according to the operator's instructions to hold this water

(Testimony of David J. Shore.)

in the pond at a certain elevation. As that stream flow increases, that operation increases. Then we will gradually open up this second gate. If the stream flow is too much for the second gate, the same is repeated on the third gate. We start opening that slowly as the stream flow continues, and so on up until they are all open. That is the operation of the spillway.

Exhibit 8 for identification shows the dam and the gates very clearly, but does not show the gorge of the Lewis River downstream from the gates so it could be described from this picture.

(Thereupon Exhibit 8 for identification, a photograph of the dam, was admitted in evidence and marked Exhibit 8.)

I know the height of the dam. It is elevation 240. The water can be impounded to elevation 240 before it goes over the top of the dam. There is no other spillway than these five gates represented in this picture. (Exhibit 8) [69]

I know the dimensions of those spillways. Assuming that the water is at a level of 237 in the pond, the big ones will spill about 30,000 second feet apiece, and the little one will spill close to 7,000. The big ones are all the same size; all but the little one, No. 1.

The amount of water taken into the machine is according to the load. By load I mean the kilowatts on the machine. If it is pulling 20,000 kilowatts it will take less water than if it is pulling 45,000 kilo-

(Testimony of David J. Shore.)

watts. The maximum it will take is about 130,000 (3,000) at full load. The minimum can go to zero. It can be shut off, with the machine running practically shut off.

The height of the water in the lakes does not have anything to do with the efficiency of the operation. It is the same as a pressure on a boiler. If you decrease the head, you decrease the pressure on the machine, and consequently it cannot pull as much load.

The intake was not cut out on the 20th. I cannot remember the amount that was going through the intake on that day. That load varies throughout the day.

I have a means of knowing what the intake was letting through on the 20th. We can get the records to show what it was pulling all day. (Witness taking his log book) This log book is our own,—done in the power house. We keep it ourselves, the original information being in the log. That is kept manually. This is a description of the record as went on by each man, his performance during the day. It is kept on a log, a separate log sheet. We don't record the kilowatt output in this log.

The water going through the intake subsequently gets into the channel of the Lewis River below the dam. None of it is consumed. As to what would be about the average outflow through the intake during the day, starting in on the 18th, 19th, 20th and 21st,—I can't remember the load. If I could re-

(Testimony of David J. Shore.)

member the load,—any way of my remembering twenty-four readings a day in my mind, I could tell you exactly what was going through the intake, [70] but I am not capable of remembering twenty-four hour readings, and every one of them different on the 20th.

I do not know what sort of a load it would be at this time of the year. It could be 20,000 one hour, and 20,000 dumped on to us in fifteen minutes. The cause of such a heavy dumping would be that some of the other plants in service would be taken out of commission for some reason. Those things vary from day to day, hour to hour. Somebody throws on 10,000 kilowatts some place in a mill; that changes our load immediately. I don't recall whether any such changes took place in December, 1933. As I recollect, the load was an average load. I don't what it was; I can't remember that.

As to whether or not more water or less water goes through the intake than would be the average flow of the water in the Lewis River,—why, the average flow of the Lewis River, at the maximum flow in the machine, would be like a drop in the bucket to the average flow of the Lewis River. The average flow of the Lewis River is around 1500 to 1800 second feet,—I mean 15,000 second feet, against 3000 second feet, something in there; that is a full load on the machine against what I say is the average flow.

As to what means the Company took to maintain the average flow in the river below the dam from

(Testimony of David J. Shore.)

October, 1933, on to after this flood,—well, if we are not spilling, the flow of water in the Lewis River is what is coming through the wheel. By "through the wheel," I mean that intake. As to the correct term, you can call it all intake if you like. It is going through the intake out into the river through the machine.

As to what becomes of the rest of the water that is not going through the intake,—that is not the average flow of the river. That is when the Lewis River is down below what the machine takes. As to what becomes of the water that is not used, if it does not go through the intake,—well, the intake is taking more than comes into the lake, or about the same; the water [71] stands even. As to your thinking I said it was greater a moment ago,—you were talking about the average flow of the Lewis River when I made that remark. With reference to talking of the average flow in the Lewis River,—I do not wish to change my statement regarding it. The average flow of the Lewis River, say from October, 1933, and the 23rd day of December, 1933, is greater than would go through the intake. We spill what don't go through the intake. If we don't spill it, it would build up like in a rain barrel and run over the top. I don't know how much water this dam contains at elevation 237 feet.

I have been superintendent of the plant five years. At elevation 235 there are 300,000 acre feet of water in the dam. At elevation 237 feet, I would say up to

(Testimony of David J. Shore.)

130,000 second feet will be let through the spillways if all the gates are wide open, plus what load was on the machine at that time; that is, 130,000 second feet, with all the gates wide open. Second feet is the amount of water passing a given point in that area; and acre feet is an acre a foot deep. As to translating the second feet into acre feet going through the spillways, say when all five gates and the intake are open, I have an example: I couldn't do that very readily, but if the gates are all open twenty-four hours a day at the elevation of 237 something, we spill 285,000 acre feet. I do not know the number of acre feet which is the average flow of the Lewis River.

On the 20th day of December, 1933, the gates were not all open, and they were not all open at any time of day during the twenty-four hour period of December 19th. As to what gates were open on the 19th of December—No. 1 was up 10 feet; No. 2 was up 8 feet, and No. 3 was up 4 feet. As to what height that would make the water in the lake,—the water could remain the same in the lake if I opened them all. That is simply to take care of the stream flow by opening those gates as necessary. The lake level remains the same. As to whether the opening of the gate has any effect upon the lake level, we don't allow it to. We just open the gates to put through the spillway what isn't going through the machine, to maintain a certain level on the [72] lake. The level of the water on the lake is main-

(Testimony of David J. Shore.)

tained by opening these gates, as I explained. The opening of the gates does not necessarily affect the level of the lake. As to what it does do, this government chart that we go by, that is turned in to the government, we are running, say, at elevation 235 and the water has a tendency to go above 235. We open the gate a little bit. The water has a tendency to go below 235, we close the gate a little bit to maintain that water at a certain level, the same as it keeps steam on a steam gauge on a boiler at a certain pressure.

On the 19th we had gates No. 1, 2 and 3 open this much: No. 1 was open 10 feet; No. 2 was open 18 feet; No. 3 was open 14 feet. As to what level that would keep the water at, I haven't got that elevation here. It would keep it wherever we were trying to keep it at. We wouldn't open any gate enough to pull the water one way or the other. If we maintain a certain level, we do that by regulating the gates. On the 19th the elevation was 235. That means the water was 235 feet above the bed of the Lewis River, and that gives us our working head, 185 feet; not the bed of the Lewis River; the elevation of the water in the Lewis River. When I say the elevation of the water in the Lewis River,—that is elevation 50 against any elevation on the dam.

With those three gates open as I have described, the elevation at the dam, I said, was 235 feet on the 19th. Then the water would be 235 feet deep, less the 50, or 185 feet. The 50 is the elevation of the water in the river. You have to measure between those two points. I do not give the river 50 feet in

(Testimony of David J. Shore.)

depth. That measurement is from sea level. That is what the 235 means. In other words, we subtract 50 from the elevation we have in our books, because it is that much above sea level. The term "235" is the elevation above sea level. In other words, the bottom of the creek, of the river there, is 50 feet above sea level. The water at the tailrace is 50 feet above sea level. The tailrace is just below the dam.

As to the opening and closing of the gates on the 20th, well, [73] at 10 o'clock—No. 1 gate was up 10 foot, No. 2 was up 25, and No. 3 was up 14. At 2:30 P.M. No. 1 was up 25 feet, No. 2 was up 25, No. 3 up 14; and that was keeping the water at elevation 235. That is on the 20th. There is no Mr. Dove in our employ. The man by the name of Dave is Mr. Shore (the witness).

It is a fact that on the 20th I ordered the level of the water raised to 236½ feet. To let the water raise to 236, the gates were left at the same elevation that I just mentioned, to let the water come up into it in the lake.

As to how the gates open and close, by hand power or as to what means we have to do it, we have a motor on all the gates. As to whether they open like a warehouse door, well, it is a radio (radial) gate, quadrant working on a hinge, and the motor is geared from that, and it either pulls it up or puts it down. As to whether, after I ordered the water raised to 236½ feet, the gates were again opened or closed,—we continued to open the gates then from

(Testimony of David J. Shore.)
time to time until we reached the peak of the flood. As to how much we opened the gates, after we raised it to 236½ feet,—well, on the 21st, No. 1, 2 and 3, was up 25 feet, and No. 4 was up 10 feet. At 5:30 on the 21st, Nos. 1, 2 and 3 was up 25 and No. 4 up 14 2/5 feet. That was midnight to eight o'clock in the morning of the 21st. The gates were again closed the 21st. At 2 P.M. the pond went down to elevation, or to a certain spill. The pond stayed right at elevation 236, and we closed No. 4 from 14 to 11 feet. During the period of the 21st the elevation of the pond, according to the records I have before me and from which I am reading, did not go down. The gates were not all opened on the 21st; No. 5 gate was closed. It was opened on the 21st, from four to twelve; No. 5 gate was up four feet at 9 P.M. All the other gates were up; but No. 5 was up four feet. As to whether there was a period of time there on the 21st that I was not able to close them,—there never was a time when we were unable to close the gates. All of them could be closed at all times. We don't require power to close the gates. We close them simply by putting my hand on a lever on a magnetic brake which has a spring tension on. When we take our hand and take the spring tension off, [74] that gate would close too fast. I did not close them by the hand brake; at 12:16 all of the gates were wide open; just after midnight on the 21st,—after 12 o'clock. They remained open until 2 o'clock on the 22nd. As to how they were then closed,—we got a

(Testimony of David J. Shore.)

power line in and hook them up and had the power on them.

As to why I didn't close them by hand,—well, the rain we were having that day; we got three and a half inches of rain, and in our judgment at that time with that rainfall,—our judgment was prompted by other times from the first of the month on where we would have a freshet, and probably drop; we had no reason to think we would not go further than we had. That is the reason we did not drop them. We could have dropped them at any time. We did not have to get another Portland Company's power to do it with. We used our own Company's power. It came over our Clarke County network. I don't know what stations were tied in at that time.

The elevation dropped during the period that the gates were all opened. It was a gradual drop. I don't remember exactly how much until we get this government chart. I would say that it came up to that point just about on the same curve as it went down. A little faster coming up right before twelve o'clock, but it went down gradually; no large drop. It took, I would say in the course of it, maybe hours to go a foot, maybe, or two foot, something like that, but those can all be gotten off these government records. That will show that drop exactly from the time it reached the crest until it went down.

Our own record shows the elevation on the drop. I will look; it is hard to remember all those things. I do not see the elevation here in this book.

(Testimony of David J. Shore.)

As to the width of the gorge below the dam, starting at the power house, I really don't know how wide it is; around a couple of hundred feet—something like that, but that will show on our plans. I would say the bluff [75] on the Clark County side is around 35 or 40 feet on the Clark County side; and on the Cowlitz County side, well right below the dam would be the elevation of the spillway floor. Then, as you leave that on down the river through our village, it goes up to probably 75 or 100. When I speak about our village, that is where Mr. Schmidt and I and the other boys live; that is right close by the dam, probably four or five hundred feet below the dam, my house. My house sits on a practically level bench there. I don't know exactly how high that is above the bed of the river; the contours will show on our plans, the elevation where my house is; the contour lines on the plans will give you all those elevations. I don't remember them definitely, to state. As to whether there is quite a gorge starting up at the dam and leading down the river for a distance,—well, it is about 500 feet probably before it widens out into a wide channel. Then it does not exactly open up into open territory straight downstream. It flows over onto the Clark County side in a curve, and then around the channel and down. I never paid any attention to the exact distance down the river before it reaches the farm land; not to state definitely how far they are. They vary on the

(Testimony of David J. Shore.)

Cowlitz County side; as far as I know, about a half a mile, and a quarter of a mile below that is another one. On the Clark County side I really couldn't say how far down one of them is; I never paid any attention to it, to be honest about it.

(Cross-Examination by Mr. Evans)

That automatic recording device that I mentioned on the dam records the elevation of the water in the lake. That is the government record. That is recorded constantly day and night upon an automatic cylinder, a revolving cylinder. It is a chart in a cylinder that works on a float; that record goes to the Geological Survey in this building. That record will show the elevation every hour in the year. When I speak about elevation 240, that is elevation 240 from datum plane; I don't mean from the bottom of the dam to the top of the water. The water might be very shallow and still be at elevation 240, owing to the contour of the bottom of the river. [76]

The gates are used to maintain the level of the water in the lake. To illustrate, using the moulding of the Judge's desk as an illustration, as the water comes up, if I didn't open the gates the water would keep coming up. In order to hold it at that level we operate these gates. If the water coming down the river is more than is required to pull the load, and

(Testimony of David J. Shore.)

the water starts to build up to a given point, we start to open the gates a little bit to keep it at stream flow. In other words, if the water starts to come above the 235 mark, then we open that little gate a little bit, enough to hold that line. Our effort in the operation of that dam at all times is a stream flow operation. After we get our winter storage, then we try so to operate the gates as to let the outflow in our gates equal the intake of the stream above; just like if we was not there.

Plaintiffs' exhibit 8 shows two gates spilling there. The small gate that we used for most of our operations is the little one over at the far side,—over at the left facing this picture. (Exhibit 8) The lake extends back 12½ miles, I should say.

(Thereupon the cross-examination of the witness Shore was temporarily deferred to permit another witness for plaintiff to testify.)

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E. J. F. CALKINS,

a witness for plaintiff, being first duly sworn, testified as follows:

(Direct Examination by Mr. Lord)

My name is E. J. F. Calkins; I reside at Tacoma. I am a civil engineer with the Department of the Interior, Bureau of Geological Survey. I have in my possession the records showing the elevation of

(Testimony of E. J. F. Calkins.)

the reservoir and the records showing the flow of the river at the Ariel dam during the period covering December, 1933. These are the original records. They belong to the Federal Power Commission. The record which you hand me, marked Exhibit 9 for identification, is a record of the gauge height of Lake Merwin reservoir, taken at the dam. The gauging station is on the dam, up the fore bay at the dam. [77]

I am familiar with the mechanism which produces that record. As to how this record is produced mechanically, automatically,—there is a pencil that is operated by a clock, and a sheet of this paper is passed around a cylinder which operates just beneath the pencil. If the cylinder isn't rotated the pencil during the week will make a straight line across the chart. The cylinder has a wheel on one end over which passes a tape, and on the end of that tape in the stilling well is a float, and as the water raises or lowers in the well it turns this wheel by passing this tape over the wheel. That turns the cylinder and causes the pencil to mark variations of the surface of the water on the chart. The chart is graduated so that the rise or fall of the float in feet is translated into the scale that is on this paper; so that regardless of what the elevation would be, the pencil within reasonable limits would mark a corresponding mark on this graph. Of course there are small mechanical errors; we have them as much

as a tenth off within a month's run or a week's run, —a tenth of a foot in elevation. I wouldn't say they wouldn't vary more than that; there are occasions when they have varied more than that, certainly.

This chart (Exhibit 9) shows that the average elevation of the water behind the dam on December 15, 1933, was 234.4 feet; that would be the average elevation for that day. In that twenty-four hour period there was a variation of approximately .2 of a foot. I have the record here for the 16th day of December of this same year. The elevation for that period is 234.6. On December 17th of the same year the average was 234.8. On December 18th the elevation was an average of 235.1. That represents an average rise of .3 of a foot higher. On the 19th of the same year the elevation was 234.5 feet, and on December 20th of that year it was 234.6 feet. On December 21st, 1933, the average elevation was 236.9 feet. That represents a rise of 2.3 feet over the preceding day.

I do not know the area of Lake Merwin directly behind the dam. The records are in the office. My subpoena didn't require me to bring that. I [78] do not know roughly how long that lake is. As to whether I have any idea whether it is a mile long or 50 miles long,—I would say it was between the two. I can't say whether it is more than ten miles long because I haven't been at the station. I wouldn't know whether that lake was ten miles or whether it was twenty miles long.

(Testimony of E. J. F. Calkins.)

I testified that the mean elevation of the lake on the 21st was 236.9 feet. That shows approximately a foot and one-half rise during the day. That graph shows the record from midnight of the 20th to the end of the 21st. The scale is quite small, but as nearly as one can tell from the record the peak elevation was reached at midnight on the 21st, possibly a few minutes before. That is a few minutes before the beginning on the 22nd. The record shows a raise during that day of approximately a foot and one-half. The next chart showing the elevation on the 22nd shows that from the peak, about midnight on the 21st, the stage dropped all during the day of the 22nd. It dropped approximately four feet. On the beginning of that chart, which would be the beginning of that day, the 22nd, the elevation was 237.6, and at the end of that 24-hour period the elevation was 233.6. The records indicate that during that period the lake fell that amount,—approximately four feet.

I was ordered to appear here forthwith and bring this copy and a certified copy—photostatic copy. I was not able to bring the photostatic copy so I brought the original. I will have photostatic copies made of these records from the 15th to the 25th of December, 1933, and have them charged to you, William P. Lord and Ben Anderson.

On December 23, 1933, the stage of the lake rose approximately a half of a foot from the low point

(Testimony of E. J. F. Calkins.)

of the day before. At the end of that twenty-four hour period the elevation was 233.5. The mean elevation for the 24th was 234.3 feet.

As to whether or not the elevation was ever raised to such a height [79] as it was on December 22, 1933,—the stage was higher during 1934. The stage was 238.4 feet during the week of May 5 to May 12, 1934, 238.3 feet.

This paper which you hand me, marked plaintiffs' Exhibit No. 13 for identification, is our records of elevation of Lake Merwin as computed upon the original chart; that is the original. Those other two are prints; as a matter of fact they are duplicates. I brought the copy along to save the original; you may use that without objection. That chart represents the computed water stage elevations as determined from the automatic gauge height chart. That chart discloses that on December 20, 1933, the elevation of the lake was 234.6. And on December 21st the elevation was 236.9, representing a rise of 2.3 of a foot. On December 22nd the record discloses an elevation of 235.5; that is 1.4 feet less than the day before. On December 23, 1933, the elevation was 233.6 feet. I think the discrepancy is that these are mean gauge heights for the day. You were asking a little while ago about maximum variation during the day. This is the mean level for the day. In the event there was a violent change in the elevation it would appear more accurately on the graph that it would on that record, because that record shows

the mean for the 24-hour period. The graph shows the elevation momentarily correct as closely as you can read it.

(Thereupon plaintiffs' exhibit No. 13, a graph showing water elevations of the lake, was received in evidence and marked plaintiffs' Exhibit No. 13.)

Of these three papers which you hand me marked Exhibits 10, 11 and 12, for identification,—No. 11 is the original, showing the daily discharge of Lewis river area for the year ending September 30, 1934, and Nos. 10 and 12 are prints of that original. They are all the same. You may use one of those prints. That chart (Exhibit 11) represents the mean daily flow in cubic feet per second.

A cubic foot per second is a cubic foot of water passing a given point in one second of time. If you had a figure on here of 84,000, that [80] would mean that many cubic feet per second falling, though not necessarily falling over the spillway. The term acre foot is a volume of water equal to one acre in area and one foot in depth. In other words, it is a measurement of quantity. That is also true of second feet; they both represent quantities of water. We compute all our records in this district in acre feet. You will find that at the bottom of the page.

The mean flow on December 17, 1933, was 17,200 second feet. I cannot tell from this chart (Exhibit 11) what the peak flow was on that day. The figure in the upper right-hand corner of this chart (Exhibit 11) represents the maximum peak discharge

(Testimony of E. J. F. Calkins.)

of the Lewis River area for the year ending September 30, 1934. That would be the instantaneous peak for the year. On this chart (Exhibit 11) the peak for the monthly flow is shown only in mean second feet. The mean for the maximum day is shown. The mean on December 17, 1933, was 17,200 second feet. The mean discharge on December 18, 1933 was 46,600 second feet.

I observe the letters written in the chart "E.S.T." (estimated). The gauge height record is obtained on a chart, a graph similar to the one we were just looking at, but a little different. It is a continuous chart record, and the flood of the 21st and the 22nd submerged not only the recording instrument but the house in which it was housed. The clock was stopped and the records for that time were lost. As to the means used for estimating after the clockworks break-down,—well, our maximum discharge we determine from observing the high water marks that were left by the flood, and on these other dates the discharges were determind from gate operation and from lake elevations, information which was furnished by the Inland Power & Light Company. From my experience I would consider those estimates to be accurate. We consider them so thoroughly accurate that we prepared them for publication on a daily basis.

On December 19, 1933, the flow was 40,200 second feet. On December 20, [81] 1933, the flow was 44,600 second feet. On December 21st, the flow was

(Testimony of E. J. F. Calkins.)

84,600 second feet. The record shows the peak to have been at midnight on the 21st, and on that same day, when the spilling increased to 84,600 second feet, the elevation in the lake rose. On December 22 the mean discharge was 114,000 second feet. On that day (the 22nd) the elevation of the lake dropped four feet over the entire day; four feet, from midnight to midnight.

The figure of 129,000, on the top right-hand of the chart, represents the peak discharge some time in the morning of December 22nd, as distinguished from the mean of 114,000 second feet for that day. The distinction between the peak and the mean is, that if you were to take an average of all the water flowing during the day, that would be the mean discharge, but you might during the day have 100,000 second feet and 129,000 second feet. This chart then indicates that at one period in that 24 hours, water was being discharged at the rate of 129,000 cubic feet per second during the morning of December 22nd. I cannot tell from the chart at what time in the morning. The records show that the water level of the lake dropped.

I am a professional engineer, and a college graduate. I am not registered in this state yet. I have had years of training and experience.

Exhibit 14, which you hand me, is a blue print of an original in our office. This chart (Exhibit 14) explains the relation between the discharge and the elevation of the river at the point at which

(Testimony of E. J. F. Calkins.)

the gauge station is located. I would not be able to tell from this chart how much more water would be discharged at an elevation of 236 feet, as compared with four feet less in the lake elevation. As to what I can tell from this chart,—the gauging station for Lewis River at Ariel is located below the dam, and this curve represents the relation between the discharge at that point and the elevation of the river at that point below the dam. This is kept as a part of the records required by the Federal Power Commission. The project is in [82] a Forest Reserve, and streams of that kind are under the supervision of the Federal Power Commission, and they require that records of flow be kept. The records of stream flow are used for innumerable purposes. This particular record is to determine the mean daily flow of the Lewis River at Ariel. It is published in water supply papers, and it is for public use. I don't recall the date the station was established, but it is running at the present time.

As to the average flow of the Lewis River at Ariel,—I could give you that from 1924 to 1933, inclusive. The annual mean is 4,370 second feet. That is the average for all these years. We have records of the mean flow of the Lewis River above the Ariel dam, but it does not include all of the water that enters the reservoir.

(Thereupon plaintiffs' exhibit No. 14, a chart showing the relation between the discharge and the

(Testimony of E. J. F. Calkins.)

elevation of the river at the point at which the gauging station is located, was admitted in evidence and marked Exhibit 14.)

As to the records which are kept with reference to the water entering the dam,—there is a record of Lewis River below Smith Creek. There are records of the Lewis River near Amboy, but I believe that station has been submerged by back water from the dam; but there are records over a long period for that station. We have them in our office; they are here in published form. I don't want to say that over a mean period of a year the flow into Lake Merwin would be substantially the same as the flow below, because I don't know what streams may be entering the lake other than the main stream. You would have to take into consideration the fact of evaporation also if you wanted to go into that much detail.

(Cross-Examination by Mr. Gray)

The mean elevation of the reservoir on December 10, 1933, was 235.2 feet, and the mean discharge on that day was 52,600 second feet. I do not [83] have here the records which would show the peak discharge on that day. My subpoena didn't require that they be presented, but the mean was 52,000 second feet. When I speak of mean, that in effect presupposes adding the hourly discharges, and dividing by 24. On this particular river the stages of the river are affected by power regula-

(Testimony of E. J. F. Calkins.)

tions, and we determined the mean discharge on that stream by means of a mechanical integrator,—an instrument that we can place along in the graph, and read off the mean discharge for the 24 hour period.

That graph is graduated with horizontal and vertical lines. The lines one way show elevation in feet, and the other way they show the hours, so that you can determine from that with reasonable accuracy the discharge at any given time when the record is operating. The down river recorder did not wash out. It was submerged; it made pulp of it. I don't want to say that it was submerged on the 18th, but the records back to the 18th were destroyed; for some reason or other it was not there when the record was removed. Those gauges are installed for the purpose of maintaining permanent records. I don't have clearly in mind how high over this gauge the high waters went, as determined by the flood levels. I know that the recorder was submerged by several feet, and the house was submerged, but by how many feet I don't know. It was recorded by our field men, but I don't have it in mind. In that sort of recording house there is a float that operates in the still well, which makes this pencil record on this disc which is up above, so that the recording disc would be up above the float and above the water level, normally. The high water didn't destroy the instrument or the gauge house, but destroyed the record itself. When I

(Testimony of E. J. F. Calkins.)

say "record", I mean the paper on this roll. After being submerged, none was sent to the office; nothing at all.

The records show that the mean daily flow from midnight on the 20th to midnight on the 21st was 84,600 second feet. If the flow is uniform and constant throughout that 24 hour period, without any variation, then the flow all the time would be 84,600 second feet, if it produces that mean; so when [84] you have a mean of 84,000 second feet, unless the flow is uniform all the time, that mean presupposes some flow much higher than that during that period, and some flow lower than that. When our gauge record was destroyed on the 21st, so that we couldn't determine the actual peak of the 21st on account of the destruction of the record, the only way of calculating the hourly peak on that date would be by reference to the gate openings at the dam at any given period, with the known discharge of each gate under a certain elevation of water.

On May 13, 1934, the elevation of the lake was at 238.4. That was not a flood period in the stream. The stream flow on that day was 2,720 second feet.

The earliest stream flow records that we have on the Lewis River are for Amboy, near Amboy. They go back to February, 1911, and cover the period from February, 1911, to April, 1931. I understand that Amboy is within the territory that was absorbed in Lake Merwin. The mean annual flow of the river at Amboy during the period from 1911

(Testimony of E. J. F. Calkins.)

to 1931 was 4,050 second feet. The maximum flow at Amboy during that same period shows a discharge of 60,000 second feet on December 18, 1917. There are other records of measurements farther up; but they don't cover as long a period. The record for the Lewis River near Cougar runs for the period from July, 1924, to the present time. The mean flow at that point prior to the flood of December, 1933, shown in our records is 2,690 second feet.

The maximum flow at that point (near Cougar), as shown by our records, is a maximum larger than this, but it is on records that I do not have with me. This record, this publication covers to September 19, 1933. I do not know from recollection approximately what it is. During the 1933 flood the gauge at Cougar filled; the banks were washed out and the stilling well and part of the house were filled with sand. I can't say how far above Ariel that is; it is just below the mouth of Swift Creek. I haven't had occasion to [85] determine that. I do know as a matter of fact that it is further up the river than the upper end of Lake Merwin. In other words, the Cougar is wholly unaffected by any operations at Ariel.

Prior to these floods of December, 1933, there is no other record on the Lewis River which shows a higher discharge than the 60,000 second feet at Amboy; so that the mean flow on December 21st, 1933, of 84,600 second feet, that mean flow for that

(Testimony of E. J. F. Calkins.)

twenty-four hour period, was approximately a third higher than the highest previous known flood on the Lewis River, as shown by our records. This 84,600 foot mean discharge of the Lewis River at Ariel on the 21st of December was higher by 24,600 second feet than the flood recorded in 1917 for the Lewis River at Amboy. That 60,000 second feet at Amboy was just an instantaneous peak, for a short period, but at Ariel the discharge was for the whole 24 hour period.

(Redirect Examination by Mr. Anderson)

The recording instrument of which I spoke as being submerged, and its relation to the float mechanism, is so located that there is a well constructed beside the river. On top of the well there is a house, and in this house the recording instrument is set. The well extends below the floor, and the float operates there below the floor. I don't know in this particular instance what the height of the clock would be above the level of the water, but the water rose and inundated the clockworks and the chart itself and the building. It set over as a sort of a well alongside the river. The fact that the water was allowed to raise to the point of elevation 236 feet had nothing to do with the inundation of the clockworks. You are now talking about the rise of the water to 236 feet elevation in the reservoir; but we are talking about a gauging station situated below the reservoir. My figures here are

(Testimony of E. J. F. Calkins.)

taken from the gauging station below,—the gauging station for the discharge of the river. I am not talking about the elevation chart at all. The river recorder was the instrument that was put out of commission. We were then compelled to estimate the flow. It was estimated in our office, [86] but the original information is in the possession of the Power Company, in their log. These estimated figures which I have testified to are not the company's own figures. They are computed from our own records of elevation, and from the company's figures of gate operation and power load. It is my recollection that one of our men went to their office and took the figures from the company's log. We made computations from those figures furnished by the company.

I testified with reference to a gauging station at the town of Amboy, situated possibly southwest of the upper end of the Ariel reservoir. I don't know how many miles from the Ariel dam, but in my opinion it is about ten miles. The Geological Survey formerly had a gauging station there, which was operated at that time from the Portland office. We do not have one there now. The gauging station at the Ariel dam operated parallel with the one at Amboy for several years. We have discontinued the one at Amboy. I don't want to be quoted as saying that the Amboy station is ten miles from the Ariel dam; it is above the Ariel dam. I am not sufficiently familiar with the region to know whether or

(Testimony of E. J. F. Calkins.)

not there are any intervening streams flowing into the Lewis River between Amboy and the present gauging station. I have no map with me. I can determine it by taking a little time to locate the station on the map. I don't know from my present knowledge whethere there are any intervening streams between Amboy and the Ariel dam or not. I know whether there would be a comparison for the purpose of comparing the stream flows between the former gauging station at Amboy and the present gauging station at Ariel dam. I know the lower gauging station at Ariel is farther down stream than the station at Amboy but I don't know whether there are any intervening streams or underground rivers. As to whether the flow would be the same at those two points, Amboy and below Ariel,—that question can be answered, I think, from the records. I have here a water supply paper 724, containing a record of Lewis River near Amboy for the period October, 1930, to April, 1931, and there is a parallel record in the same publication for Lewis River at Ariel. A daily comparison would not be fair because of power regulations. [87] The monthly mean discharge at Amboy on the Lewis River for October, 1931, was 54,800 acre feet, and for October on the Lewis River at Ariel was 57,400 acre feet. As to how mean flow of the Lewis River at Amboy compares with the mean flow below Ariel dam,—I can give you that on a monthly basis. There are parallel records which might show the relation day

(Testimony of E. J. F. Calkins.)

by day, but I do not have them here. The figure I quoted was after the dam was built. I have comparisons before on the same monthly basis; the dailies are not shown in this publication.

In October, 1924, the mean discharge at Amboy was 1220 second feet, and at Ariel it was 1210. For November, 1924, at Amboy, 1820, and at Ariel it was 1980. December for Amboy, 5290; for Ariel 6270. For January, 4100 for Amboy; 4680 for Ariel. For February, Amboy 9990, and 12,000 for Ariel. The records indicate a greater flowage at Ariel than there was at—(Amboy). The record shows that there is a difference in drainage area, and it shows what the difference is.

(Re-cross Examination by Mr. Gray)

Continuing the comparisons so as to get the average over the period of twelve months, from February, 1925, where I stopped;—March, 1925, shows Amboy 2800; Ariel 2920. For April, 2840 at Amboy, 2950 at Ariel. For May, 2850 at Amboy, 2920 at Ariel; June is the same for both. For July, 912 at Amboy, and 913 for Ariel. I would rather not testify as to the percent of allowance of increase at Ariel.

These records which are submitted to us by the Inland Power & Light Company are submitted to our office under requirements by the Federal Power Commission. The company furnishes these water stage record charts, and in the form required to be submitted to us by the Federal Power Commission.

(Testimony of E. J. F. Calkins.)

They are the original records of those recording devices. The published records have been computed from these as the authentic official records of stream elevations and flows at that dam. [88]

Nothing happened to the elevation or recording gauges at the Ariel dam during this flood. We had a complete record at that point, but the one downstream was flooded out. The records furnished at the Ariel dam itself, where we know the elevation, the size of the gates, the extent to which they are opened at any given time, and the recordings shown on that chart, would enable me or any other competent person to compute with reasonable accuracy the discharge of second feet at any given time.

As to whether the gauging records downstream, and which were submerged in this flood, really act merely as a check on those Ariel records,—well, ordinarily we wouldn't go through the immense amount of detail to compute the record from the gate openings and reservoir heights, when we have a record down below. In computing the record flow down at the river station, it is just a matter of comparing the mean daily discharge with the curve, showing the relation between the stage and discharge. The other method is long and very tedious. The calculations between the two points, however, are susceptible of comparing and checking, and should be checked.

Thereupon

GEORGE FREEMAN,

a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

(Direct Examination by Mr. Lord)

I reside about four miles above the Ariel dam; I have lived there eight years. I was there prior to the building of the dam. There is a main highway leading from Ariel and just above the dam; that is the main highway that goes on up to Cougar and Yale and places of that kind. The highway comes nearest to the river, or Lake Merwin, right just above the dam. When I go up on that road, past Lake Merwin, past the dam, I am higher than the dam. I couldn't say how much higher. That is something that I never paid no attention to. I am able to see the water in the dam from the point that I referred to. Just above the power house you could see objects that might be close in Lake Merwin, like logs, or skiffs, or people bathing. And from this point that I refer to, you can see the top of the dam; what all is above water. From the [89] place on the road that I referred to, you couldn't tell exactly whether Lake Merwin is full or not. We can tell when it is way down; but we couldn't tell how near to the top it is.

I was on my place during the month of December, 1933. I couldn't be sure whether I was there between the 17th and the 22nd. I couldn't recall the condition of the weather from the 15th

(Testimony of George Freeman.)

on until the 23rd or 4th of December. It rained a little now and then; that's all I can say. I did not go down to the lake. I don't know the height of the water in the lake between the 15th——. I recall talking and making inquiries to Mr. Grieger last week, and that was the first time that I had ever seen you. I haven't known Mr. Grieger for quite a long time. As to whether I know him by sight, well, I've seen the man before but not to know him. I get confused on the time. It was Friday that I saw you, wasn't it? It was some time the latter part of last week. As to whether at that time I told you that I had gone to the Ariel store on Wednesday and looked at the water in Lake Merwin, and that the gates were closed of the dam, that the water was full up practically to the top of the dam,—that was before the flood, but I couldn't say what day it was. I recall going down to the store; how long before the flood it was I couldn't say. At that time I was able to see the water in the lake. It was up pretty well, but I can't make a definite statement on that distance. I did not see the spillways, and don't know them. I saw the gates from the road.

I couldn't say how long it was before the flood that I went down to Ariel; I couldn't say whether it was within a week of the flood. I couldn't say whether I didn't tell you at that time that it was just one day before the flood that I went; it was before the flood. I know it was raining a little at

(Testimony of George Freeman.)
the time we went down, I don't recall anything about the rain. It would have to be in December. I couldn't be sure about what part of December it was.

(Witness excused; no cross-examination.)

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Thereupon

FRANK HASTING MILES,

a witness on behalf of the plaintiffs, [90] being first duly sworn, testified as follows:

(Direct Examination by Mr. Lord)

My name is Frank Hasting Miles; I live on the Lewis River about three miles below the Ariel dam. My property is located on higher land than the bottom lands. I have lived on the Lewis River since February 13, 1913. I am a farmer, poultry man and dairy man. I have been employed in another vocation. I am sorry to say I was on public construction for thirty-three years;—waterworks, railroads, or anything that the company could bring up that I was working for. I engaged in work in connection with the impounding of waters for reservoir purposes. In my time I think I have built about seven dams, but they was for domestic purposes, which didn't store much water. Most of them was for seepage, storage, such as in Butte, Montana, where we stored 13,000,000, and we thought that was lots of water.

(Testimony of Frank Hasting Miles.

I never kept or made any records of the height of water in the Lewis River below the dam. I made some markings on trees. The first marking I took was I think in June, 1917; that is the first high water I seen. I marked a tree. I can show you the tree any time. I've got the mark on the tree. That is all I done; I never took no records. That day the water raised, I had to go and carry my child, who was going to school, across this ravine, and I had rubber boots, and that was high water at that time. I can't say how high that water was above the river channel because I don't know how deep the river was, but there was a rise of about eight feet in the river at that time above the regular flow of the river; that ain't saying the bottom of the river. We call it an eight foot rise; that is the highest I ever seen it. It extended over to Mr. Grieger's property; I know that because a logging outfit, whose name I forget, cleaned the river every year and they had a couple of boats there; they called one the "Speilei", and they sawed a lot of ties, and of course there was a low place on there towards Mr. Grieger's property, and they had drove a few piling in there so to shoot them around, and carry them down the river; that is all I——. [91]

I was in court this morning and I heard one of the witnesses speaking about what I call a jetty there along this property; right where there is a few piling to throw that water around so the logs wouldn't run in the little holes. You see if they

(Testimony of Frank Hasting Miles.

run in that hole, they run about a quarter of a mile right along between there and the river. This was the river, but it was just a little stream that run down alongside, and eventually run back into the river, you see. I seen this little jetty when it was built in there; I know the men that built it. It was just built for the purpose of keeping the logs from going in there, to turn them down into the larger part of the channel.

During the several years I have lived there the dam has been constructed at Ariel. I know Mr. Shore and Mr. Schmidt. As to whether I know any other employee at the dam that was there in December, 1933,—I know them all. I know Mr. Webster, and I know Mr. McKee, only I don't know the attorneys. I am not much acquainted with them. Mr. McKee is not here; I haven't seen him today. He is president of the company. As to what Mr. Webster does,—Mr. Webster bought my place and sent me the check for it for the Inland Power & Light Company, which is now known as the Northwestern Electric Company.

In December, 1933, it was very rainy. The rain didn't affect the flow of the Lewis River down at my place, but it was filling the dam, or the lake as they call it, the reservoir. It is three miles from my place to the dam. Not much of anything was happening to the Lewis River, that is, down where I live, three miles below the dam, because they run the wheel up there, and they use just

(Testimony of Frank Hasting Miles.

what comes in, and then what is over they use for storage. Sure I seen what was taking place in the dam during that rainy period; the lake was raising, of course. During the period up to December 22, 1933, it was pretty near overflowing. It is pretty hard to say actually how near the top of the dam the water was, because you can't get in front of the dam, see. You can't get directly back of the dam. It is probably anywhere from six feet here down to a hundred feet down there (indicating). Of course you can get back there maybe 50 feet or more, but you can't tell anything about the water [92] there. Well, you come around here in front, and here is the dam comes this way, and (indicating) it is on a radius of probably a thousand feet in a circle, you see. Well, you can't get around on the side of it there. You can get at the end and look that way, and maybe you will say that day probably two feet, as near as I can guess at it, two feet from the top of the coping of the dam. I would judge the coping is about six inches.

As to whether I know by what means the dam was equipped to release the stored waters—I think I do. While I am not very bright about electricity, there is, I believe, five gates, a little one and four larger ones, and each one has got a big concrete pier built up and on that sets a crab or winch, I don't know what they call it, I call it a crab, that is run by electricity; and when they want to raise the dam

(Testimony of Frank Hasting Miles.

—to lower the water, why they go over there and do something with this electricity and up it slides. That is about all I know about it. As to my knowing how it is closed,—well, they just go up and press a lever, and the wheel starts, and it just starts back.

I observed these flood gates during the period of this heavy rain. Flood gates is all the gates there is there; there is these five flood gates, and they control the water, and I don't know, you can call them flood gates or permanent gates or whatever gates you want to call them, but flood gates—well, call them flood gates, that is what they raise to let the water out. They don't lower it to let it out; they raise the gates to let the water out. The effect of the raising is to let the water go out underneath. Where I used to work we opened a hydraulic valve to let the water out. Here they raise it and let it go out.

As to whether I noticed whether those gates were opened or closed at any time during the month of December, 1933, prior to the 22nd,—yes, I believe the small one, they call No. 1, that was pretty well open pretty much of the time. That is, if I remember right, and I think there was another time—well, in fact I went up there maybe every three or four days, or maybe [93] every other day, because I had a stand-in with the superintendent of the fish hatchery there, and he had a car and he went up to look at the traps, and always said, "Come on, Dad, and take a ride", and I get in and that is how I seen the gates about every day, and that is how I seen the

(Testimony of Frank Hasting Miles.

reservoir. I went down around into the company's yard at that time, and went into the control room, and I met Mr. Smith, sometimes, and I met Mr. Shore sometimes, and I met every man that was on the shift, and had a little chat with them. I did not talk to Mr. Shore about the height of the water in the dam, not down at the station.

I was at the dam on December 20th; I did not in measurements or in figures note the height of the water impounded on that day. I just noticed how near it was to the top of the coping on the dam. It was about a foot and one-half, or eighteen inches. I did not observe the condition of the gates. The gates was about like they was, but you can't tell how the gates is, no outsider coming along and say that the gate stands at such a point, zero, or whatever——. The gates were about the same as the day before. The number 1 was up about ten feet, or maybe more, and number 2, as they would call it, I would call it number 2, was out six or eight feet, but the others was tight. Yep, I was there again on the 21st; that was the day she was just about overflowing. By looking at it across the channel you would find that it was up against the coping, that would be six inches, but of course it could not have been because the glistening of the water would make some difference.

Mr. Shore was not there that day. There was a man there they call the roustabout. I don't know what his name is. The gates on the 21st were about

(Testimony of Frank Hasting Miles.

in same condition as they was the last time I seen them. On the 21st the gates was just the same as the day before. They might have been up a little; not much. I was at the dam on the following day, the 22nd, but I don't suppose you will allow me to tell what I see if I did. No use in my sitting here and talking when you won't believe what I tell you—that is you won't let me tell what happened and what I seen. I will tell what I saw [94] on the 22nd if the Judge, your Honor here, won't stop me and I won't tell a lie. The next morning I went down to what we call the little pump station about a half mile or three-quarters of a mile from my place, and the water was down about four feet below the coping in the morning, nine o'clock. Well, of course I did not walk from there, because a man came and asked me if I didn't want to ride to the fish hatchery and I got in and rode with him, to the fish hatchery, and of course the water had come up that night, but not a great deal, just striking along the edges as I saw on the road; the water was just to the edge of the grass, the road. That would be about five feet above the average level of the stream. That was on the 21st at about half past ten or eleven. That was then about four feet lower than the chip on the tree, which I made in 1917.

I did not go back there again that day; I went back the next day. You didn't let me tell you what I seen before, so you will have no comparison to what I am going to tell you now. At this pump

(Testimony of Frank Hasting Miles.

station, the water was four feet below the coping, see. The little pump station that the Northwestern built there, to pump up water to the fish hatchery, to the fish pond, see? The idea they built the dam, and they built the traps in the dam so that when the fish went up the river they went in these traps. They put an elevator in there, and they put in steel tanks—the poles, it holds—I don't know how many gallons of water, but seventy-five fish is a load. I counted them many times as an accommodation for the superintendent. Well, they hist them up and then let them down to this place, and that is the pump station I am telling you about that pumps in the water what to freshen up this water whenever they get eight or ten thousand fish in there, they pump in and freshen the water. The water was up to four feet of that coping.

Just tell me what you want me to say and I will say it. That pump there at the fish hatchery is about three and one-half miles from the Ariel dam, and a half a mile below my house. That pump was still apumping on the 21st; it was still working. The higher the water got the better she [95] worked. It was about eleven o'clock in the daytime that I saw it when it was still working. I did not see it later on in the evening. I saw it the next day. The next day was the 22nd, when she was stopped, and the water was up running in where the insulators runs in and goes down to the pump. That insulator that I refer to is about seven feet above the floor, or

(Testimony of Frank Hasting Miles.

whatever you call it,—the coping. That coping is up on the level of the floor. That is seven feet higher.

I don't know so much about the average height of the water along at the fish hatchery, because my place was right above,—half a mile, say, above the hatchery, but I did know the water there, at least. I don't know what the average height of the water would be at the fish hatchery; I know at my place. I don't know how much higher the water was over the pump than it was the preceding day, when I was there on the 22nd. At the time I saw the water when it had not drowned out the pump at the fish hatchery it was about four feet below the coping, and when I next saw it it was about seven feet above the coping. I live four miles above Mr. Grieger's place. I went down the road as far as the fish hatchery, but I had to go around by the pipe line; the road was flooded. I saw the tree again where I had made the marking in 1917. I saw that the water was seven feet higher than it was in 1917, by actual measurement, and the mark is there now; seven feet higher than it was on the 17th. That was in the forenoon and in the afternoon. I don't know what day it was; I know it was on the 23rd, I believe. I did not go up to the dam after the 21st. It was a week before I went up after that. I went down below. I stayed around home.

(Testimony of Frank Hasting Miles.

(Cross-Examination by Mr. Evans)

I made a mark on the tree at the time of the 1917 flood. Where I was born and raised they called it a cottonwood tree. They call it a "quackermast" in this country, an old fashioned cottonwood. It is about three foot in diameter. This last flood was above the mark on that. It was very rainy. I don't know whether I ever saw it rain any more than it did in that [96] month of December, for a month; I seen it rain quite a lot since I have been here. It rained quite a lot then. I saw the water in the lake when I went down with the man at the fish hatchery. I went to the dam, I went down below before it washed out, and they allowed us to drive down around, and clear down into the station. It was before the flood when I was at the dam. I went across the bridge that was below the dam, and drove down right down to the control room. As to how close I got to the lake up above, I got within the thickness of the dam. I told you I could not tell then where the water was; I told you I don't know how high it was in there. Every day I was there they were spilling some water through the gates; I don't know how much; I could see how far the gates were opened. Every day the gates was opened some, always spilling some water—only in the summer time——.

The property that I sold to the company was below the damsite, about four and one-half miles;

(Testimony of Frank Hasting Miles.

that is some of the property that went into the fish hatchery, that creek of mine; that is why they wanted to condemn my whole property to get the creek.

I remember where these pilings were at Grieger's place. They were put in at what I described as a low place. As to whether the river came down and made a turn and these pilings were put right at that turn,—not the way you got it; it was put in this way. The piling was where the river come right down like this. The river made a turn right here, went over there against a solid bank, and right in here there was a sag, and these logs and ties used to come down, and when the water was up a little bit, went over in here, over in this sag, and went down there. What is the place that is washed out now. There was a sag in a low place before I first came to the country; and there has been a low swale all these years; it was a low place. I don't think it was washed out considerably back of those piles. I don't think there was some holes in there. As to whether I have been down in there recently,—I have been all over that country. [97]

"Q. In every freshet you had, they floated logs, they went up across the Grieger property?

A. No.

Q. Where did they go?

A. When they took the piling in they went along there.

(Testimony of Frank Hasting Miles.

Q. I say, if the piling was not there it would throw it right across?

A. It would throw it in the ground below the sag."

That low sag was a soil that is caused from so much water in sand, and the bows and stuff comes along, and turns it kind of black and mucky. There was really no live vegetation on this sag,—just the pine boughs and the knots and stuff that come washed down the river, you know of an ordinary tide. The condition that I am describing now was before this 1933 flood.

(Re-Direct Examination by Mr. Lord)

Colvin Creek flows into the Lewis River between the pump and the dam. It flows about a thousand miners' inches.

As to the raise of the water over that pump that morning.—well, there was about a ten foot stock on that pump to the coping, and there was about an eight foot raise on this morning; that would be about eighteen feet on top of the electric pump, a centrifugal pump. As to how far that pump is from where the river flows past Griegers,—the river hits a point of the coupon and it did wash out quite a hole at that time right there, but not clear around. I think I made that observation about ten o'clock in the morning of the 21st. I went down there about ten o'clock the next day. The water went down from the height down to the coupon or the coping. The

(Testimony of Frank Hasting Miles.

It is about nine or ten feet above the ordinary flow coping is located right on top of the concrete wall. of the water.

(Re-Cross Examination by Mr. Evans)

There is a creek below the dam that comes in there some place. That is the creek that the company bought for to get my place, Colvin Creek [98] is what I know the name of it. As to whether it was in flood at that time,—yes, it raised quite well. As to how much it raised,—I don't know how far in the hills it runs back. It is about twenty-eight or thirty feet wide. As to how high the banks are,—I should judge that bridge is probably eighteen feet high, and at the highest the river was up within three feet of the floor of the bridge probably. As to how deep the water got in that,—well, I seen it when it was about an inch and a half. On the 21st it must have been eighteen feet in the creek where it backed in; that is where it came into the river. Of course a mile up that creek I never seen it. That creek is below the Ariel dam and below Mr. Grieger's property. As to whether there is quite a considerable territory there below the dam and the Grieger's place that drains into the Lewis River,—well, not so much on either side. On either side the river is very abrupt.

The pump that I am talking about is half a mile up the road from the fish hatchery. According to the stakes they put along there when they built the road, I believe that is about stake 42. I should

(Testimony of Frank Hasting Miles.

say this creek is about three and a half or four miles below the Ariel dam towards Woodland; I don't know exactly, you see. On the 21st, I found the water at its highest peak, eighteen feet deep there, and eight feet over the top of the coping. That was about ten o'clock in the morning of the 21st. At ten, eleven or twelve, I went down to the fish hatchery and back; and that is the highest water I saw. On the 22nd I went back and the water had dropped about six or eight feet.

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Thereupon

SAM WILKESON,

a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

(Direct Examination by Mr. Lord)

I live along the highway about three and one-half miles above the Ariel dam. I have lived there about forty-nine years. My occupation is logging, and farming, and all kinds. I have seen the river. As to whether I saw the river at the time of this flood,—well, I saw it, but I was not [99] right down to it when it was the highest; when it was the highest I was home. I do not recollect the days when the water was the highest. I could not tell you the day, because I did not pay no attention to them. I stayed home all the time. I was not down

(Testimony of Sam Wilkeson.)

on the road for a week or ten days before the flood came there. I did not at that time observe the height of the water in the dam. As to whether I noticed the gates,—well, you look across there and see, but you cannot tell how high the water is on them, between a quarter of a mile or better. As to whether I observed the height of the water a week or ten days before the flood,—well, you just drive down the road and you look across; I never stopped. I did not observe how high the water was.

As to whether I had a talk with Mr. Grieger and you last Friday, yes sir, I saw you. As to whether I said to you at that time, that I had been up and down the highway,—well, that was after the flood.

(No cross-examination)

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Thereupon

DAVID J. SHORE,

a witness for plaintiff, previously sworn, resumed the stand.

(Cross-Examination by Mr. Evans)

I testified yesterday that the gates of the dam could be closed by hand. I referred to a brake and a brake drum. Defendant's Exhibit A-1 shows a magnetic brake on the motor, between the gearing and the gates. That is the brake (indicating on Defendant's Exhibit A-1); that brake right here is the one we can operate by hand to drop the gate at any time. Just let go with that little lever, and

(Testimony of David J. Shore.)

the brakes stop and grab at wherever you want it.

(Thereupon a picture showing the hand brake to operate the gate was admitted in evidence and marked Defendant's Exhibit A-1.)

When we release the brake the gate will close by gravity. The last day prior to December 21st when I had all the gates completely closed, was December 1st, I think. Referring to my operating record and to my gate operation day by day, beginning with December 1st, down to and including [100] December 21st,—on December 1st we were spilling 1,000 at 4 P.M. At that time gate No. 1 was up three foot; all the rest were closed.

The book that I have in my hand is our daily log book, the entire log book of the station; kilowatt hours and everything is on this log book. There is a page for each 24 hours in the month of December, 1933. Each page shows the total generated, the total delivered to the high line; it shows the gate openings, the rainfall, the maximum and minimum temperatures; everything that occurred on that day. I am now looking at the page covering December 2. The pages in the book are not numbered. The pages here come right on in sequence from December 2 to and including December 21st. That is the company's record of the operation of the gates; the spill, and the storage.

(Thereupon the pages from the company's log book, covering the dates of December 2 to 21, both inclusive, were admitted in evidence and marked Defendant's Exhibit A-2.)

(Testimony of David J. Shore.)

The record shows that on December 2nd we were spilling 1,000. No. 1 gate was up 3 foot.

On December 3rd, we were spilling 1,000. No. 1 was up 3 foot at 8 o'clock, my first reading. At one o'clock that day we were spilling 2,000 second feet. No. 1 was up seven feet.

On December 4th, we were spilling 2,000 second feet at midnight. No. 1 was up seven feet. Spilling 1,000 at 6:30 A.M.; No. 1 was up three feet.

December 5, we were spilling 1,000 at midnight; No. 1 up three. Spilling 3,000 second feet at 6:30 A.M. Spilling 16,000 second feet at 4:15 P.M.; No. 1 up seven; it does not show plainly on No. 1 At 9:30 P.M. spilling 22,000 second feet; No. 1 up 24, No. 2 up seven, No. 3 up seven. Spilling 33,000 at 11.15 P.M., No. 1 up 24, No. 2 up 12, No. 3 up 12. That shows the variation of the gates as the stream came in.

On December 6th: spilling 23,000 at midnight; No. 1 up 24, No. 2 up 12, No. 3 up 12. Spilling 41,000 at 7 A.M. The gates remained the same. Spilling 35,000 at 8 P.M.; No. 1 was up the same; No. 2 up 15, No. 3 up 15. [101]

December 7th: spilling 35,000 at midnight; No. 1 up the same, No. 2 up 15, No. 3 up 15. Spilling 20,000 at 4 P.M.; No. 1 up 24, No. 2 up six, No. 3 up six.

On December 8th: spilling 20,000 at 8 P.M.; No. 1 up 24, No. 2 up six, No. 3 up six. Spilling

(Testimony of David J. Shore.)

17,000 at 1 A.M.; No. 1 up 10, No. 2 up six, and No. 3 up six.

December 9th: Spilling 17,000 at midnight; 1 up 10, 2 up 6, and 3 up 2½. Spilling 30,000 at 8 A.M.; 1 up 21, 2 and 3 up 10. Spilling 38,000 at 2 P.M.; 1 up 21, 2 and 3 up 14. Spilling 43,000 at 3 P.M.; No. 1 up 21, 2 and 3 up 16. Spill 52,000 feet at 4 P.M.; No. 1 up 24, No. 2 up 26, No. 3 up 16. During that day we changed those gates six times, with the flow of the stream. We opened them to hold the water at a certain level in the pond, as the stream increased. On December 10th: Spilling 52,000 second feet at midnight; No. 1 up 24, 2 up 26, and 3 up 16. Spilling 61,000 second feet at 12.30 A.M. on December 10th, 1933.

I have been there ever since the dam started operating. In my experience with the plant I never saw a spill in excess of 61,000, as shown there on December 10th.

December 11th: Spilling 38,000 second feet at midnight; No. 1 up 14, 2 up 26, 3 up 7. Spilling 34,000 second feet at 3 A.M. No. 1 gate closed. Spilling 24,000 second feet at 9:30 A.M. No. 2 up 14, No. 3 up 7½. Spilling 29,000 at 11 A.M.; 1 up 17, 2 up 14, 3 up 7. Spilling 30,000 at 1 P.M.; 1 up 24, 2 up 14, 3 up 7. Spilling 34,000 at 5 P.M.; 1 up 24, 2 up 17, 3 up 7.

On the 12th: Spilling 34,000 second feet at midnight; 1 up 24, 2 up 17, 3 up 7.

On the 13th: Spilling 30,000 second feet at midnight; 1 up 7, 2 up 17, 3 up 4½. At 11 A.M., spill-

(Testimony of David J. Shore.)

ing 25,000; 1 up 24, 2 up 17, 1 up 24. Spilling 22,000 at 3 P.M.; 1 up 10, 2 up 10, 2 up 17. Spilling 20,000 [102] at 9 P.M.; 1 up 24, 2 up 17. When I say, "1 up 17", or "1 up 24",—that is the height we raised the gate. When I say "2 up 17", I mean I raised it up 17 feet, and when I say spilling a certain quantity,—that is the second feet being spilled.

December 14th: Spilling 20,000 at midnight; No. 1 up 24, No. 2 up 17. Spilling 18,000 second feet at 10 A.M., No. 1 up 10½, 2 up 13.

December 15th: Spilling 16,000 feet at midnight; No. 1 up 3 feet, 2 up 13 feet. Spilling 15,000 second feet at 6 A.M.; No. 1 up 3 feet, No. 2 up 13. Spilling 10,000 second feet at 6 A.M.; No. 1 up 14, 2 up 5.

December 16th: Spilling 10,000 second feet at midnight; 1 up 14, 2 up 5½.

December 17th: Spilling 10,000 second feet at midnight, 1 up 14 feet, 2 up 5 feet. Spilling 12,000 second feet at 1 P.M.; 1 up 20½, 2 up 5. Spilling 18,000 second feet at 3 P.M.; 1 up 20, 2 up 10. Spilling 26,000 at 5 P.M.; 1 up 20. Spilling 40,000 at 7:15 P.M.; one up 20 feet, 2 up 17, 3 up 12.

December 18th: Spilling 40,000 at midnight; 1 up 10, 2 up 17, 3 up 14. Spilling 43,000 at 1 A.M.; 1 up 26, 2 up 17, 3 up 14. Spilling 44,000 at 6 P.M.; No. 1 closed; 2 up 25, 3 up 14½. Spilling 48,000 at 8 P.M.; 1 up 14, 2 up 25, 3 up 14.

December 19th: Spilling 42,000 second feet at 12:20; 1 up 14, 2 up 25, and 3 up 14. Spilling 42,000 at 9 A.M.; 1 closed. 2 up 25, 3 up 14. Spill-

(Testimony of David J. Shore.)

ing 21,000 at 11:30 A.M.; 1 up 10, 2 up 18, 3 up 14. Spilling 38,000 at 8 P.M.; 2 up 18, 3 up 14, and No. 1 up 10; that was the same.

December 20: Spilling 38,000 at midnight; No. 1 up 10, No. 2 up 18, 3 up 14. Spilling 44,400 at 10 A.M.; 1 up 25, 2 up 18, 3 up 14. Spilling 46,000 at 11 o'clock; 1 up 10, 2 up 25, 3 up 14. Spilling 56,000 at 2:30 P.M.; 1 up 24, 2 up 25, and 3 up 14. Spilling 61,000 second feet at 9 P.M.; 1 up 25, 2 up 25, and 3 up 25. [103]

Now this is on December 21st: Spilling 61,000 at 12 midnight; 1 up 25, 2 up 25, 3 up 25. Spilling 73,000 at 12:45 A.M.; 1, 2 and 3 up 25, 4 up 10. Spilling 76,000 feet at 4 A.M.; 1, 2 and 3 up 25, and 4 up 12. Spilling 79,000 second feet at 5:30 A.M.; 1, 2 and 3 up 25, 4 up 14. Spilling 79,000 at 5:30 A.M.; 1, 2 and 3 up 25, No. 4 up 14. Spilling 73,000 at 7:45 A.M.; 1, 2 and 3 up 25, 4 up 10. Spilling 75,000 second feet at 2 P.M.; 1, 2 and 3 up 25, No. 4 up 11. Spilling 78,000 at 3:30 P.M.; 1, 2 and 3 up 25, 4 up 14. Spilling 85,000 at 4 P.M.; 1, 2 and 3 up 24, 4 up 18. Spilling 90,000 at 6:30 P.M.; 1, 2 and 3 up 25, 4 up 18. Spilling 100,000 at 9 P.M.; 1, 2 and 3 and 4 up 26.

There was no trouble in taking care of that discharge of 100,000 second feet at 9 P.M. It didn't interfere with our plant or anything else.

Spilling 105,000 at 10 P.M. That 105,000 began to interfere, but it did not, however, put the power

(Testimony of David J. Shore.)

house out of commission. No. 1, 2, 3 and 4 up 25; No. 5 up 9. Spilling 100,000 at 11 P.M., 1, 2, 3 and 4 up 26, No. 5 up 4. That is the end of the record at midnight of the 21st.

Yesterday on my direct examination I told counsel that on the 21st I raised the lake and stored water. On that day I ordered the lake to be raised a foot; I ordered that on the night of the 20th. I would say around 9:30 I gave the order. The storage of the next day, on the 21st, would show in the report which I just gave you. On the 21st we held back some water; I couldn't *saw* exactly how much; about a foot and one-half. I was at Woodland, Washington, on the evening of the 20th when I determined to hold back some water.

All of the water which comes out of the Lewis River in the vicinity of Woodland has necessarily to come by the channel and the property of Mr. Grieger, the plaintiff in this action.

With reference to the Lewis River in the vicinity of Woodland and the waters as I found them at Woodland on the 20th,—that evening the [104] water was coming up very close to the fire hall. The water was coming up very close to the street, and the apparatus was being taken out of the fire barn and taken across the street at the time I went to Woodland. That was in the road entering Woodland, as you turn the main street; the fire barn is right on that turn. By the fire barn, I mean the

(Testimony of David J. Shore.)

City Fire Department. The water at that time was within three or four feet of the road.

Woodland is fairly level. It is on the banks of the Lewis River. I was in to the telephone office around 9 o'clock. The time I was there the people were panicky, and expecting higher water. At that time I got in communication with the plant over the telephone, and instructed them to let the water come up a foot. I went back to the dam shortly after that, on the evening of the 20th. I had a telephone connection there at the dam, and was in telephone communication with the town of Woodland by telephone until after the peak of the flood, and I conferred back and forth about the water condition there and the water condition there at Ariel. I advised them of my condition and they advised me of theirs. I had the thought of the people in mind,—was trying to cooperate with them.

It was raining at that time; a very heavy rain. As we approached midnight on the 21st, that rain did not cease at all. It was raining very heavy on the 21st, and still raining on the 22nd; part of the 22nd it was as heavy.

As to the events at the Ariel dam on the night of the 21st, beginning say at 6 o'clock in the afternoon or evening,—well, the water kept increasing, gradually up until 10 o'clock. At 10 o'clock we began to notice the water come up. We had a spill, as I mentioned before, and at 10:55, I think it was,

(Testimony of David J. Shore.)

the water begin coming over our road and run into the power house. As to where the road was,—there was a bridge coming down from the village and crossing the river, at the end of the spillway, and the water, filling up over that bank, ran down the road that went to the power house. At that time the water began coming down the road, and I ordered the big machine taken off the line [105] as the water begin to come into the power house. The water begin rising steadily from that time on, and we made every effort we could to blockade the doors. The elevation kept rising very steadily, and we lost telephone communication at about 11:30, and the seven boys who were there with me got together and we decided that we should take the last gate up the full amount, and then close down, and we left the power house. When we did close we were wading in approximately a foot of water at the house machine; the last machine we had running. We (it) had broke in the blacksmith door, and large cores and roots of logs flowed through the generator floor, and the basement was practically filled at that time, and we were waiting (wading). Then outside of the building the current was so terrific it moved loading tongs, which weighed a matter of 250 pounds, a distance of our transformer platform, which I will say offhand is maybe 150 foot long. The water came up the road that is below the dam and leads to the power house at the point

(Testimony of David J. Shore.)

of the bridge which was above the power house roof. The water first went up the road and interfered with the power house at around 10:55. At that time we were spilling 105,000. Up to the time we reached 105,000 it didn't interfere with our operations. At the time we finally opened the last gate, it was then open between 9 and 13 feet. Everything else at that time had been opened up gradually, and the last gate was opened between nine and thirteen feet. A little before midnight I ordered the last gate opened wide. I finally got it opened at 12:16 of the morning of the 22nd. At the time I ordered the last gate opened, the water in Lake Merwin back of the dam was still rising.

After they began to raise the last gate, and the last gate was raised and we shut down what we call the house machine,—a small machine to take care of our spillage and auxiliary apparatus, we had to go across the swinging bridge, and two of our men got washed down, that is, washed off their feet. Then as we left the swinging bridge we had to go through the tunnel which runs up through the dam, and our battery is situated up the hill, and we had to kill the battery lights, and after that the power house was dead. Immediately we started operation at the gates; send a man there [106] to take the readings of the water and the flow from that time on, and that is about the history of the night of the—the morning of the 22nd. That swinging bridge that we came across connects the transformer plat-

(Testimony of David J. Shore.)

form, the platform that the power house is built on, through the trust block in the tunnel. It is below the dam, and is suspended from one bank of the river to the transformer platform. As to how high above the base of the river that bridge was ordinarily,—it is I should say from elevation 75, that is the platform elevation, to elevation 50, whatever the tail-race level is. That would be approximately 25 feet. It is pretty hard for me to answer how close to the water the extension bridge that we came across was because the current coming down that platform was driving timbers and loading tongs and was shooting out on to the swinging bridge, and in the dark I wouldn't want to say just how many feet it was. There were seven men there; we had to hold on, take ahold of hands till we got a hold on the railings on the bridge, and then we got across.

(Re-Direct Examination by Mr. Lord)

I said that the largest flow of water that I had ever seen go in the spillway of the dam was on the 10th. That was caused from the stream flow. As I recollect, the reading I gave was 61,000 second feet, the highest.

This book, these sheets (defendant's exhibit A-2), shows the elevation of the water in the dam each day; the elevation of the water does not show in this book. We take these sheets at the station for 24 hours, and we have a duplicate copy at the plant. This original copy is sent to the office every morn-

(Testimony of David J. Shore.)

ing. They are just loose sheets. We put a carbon copy between this one and a yellow one; send this white one to the office.

When 61,000 second feet was going through the spillways and gates, the elevation of the water in the dam was not being lowered. As to whether it was being maintained at 237 feet, I can't say offhand what the elevation was. It was being maintained at our normal flow, or probably a foot above, [107] but it was being maintained at a certain level; nothing any more than on a normal head, which is elevation 235. I let it go up to 237 on the 21st. As to whether I could have let it out before then,—well, if I could outguess the elements, I probably could have. It was just a case of opening the gates. We could open the gates, but our normal head is 235; that is our working head, the head that we bought the machines for. As to whether we could have maintained it at 235 right along if we had wanted to, if we had opened the gates up,—we could not have on the night of the 21st. We never at any other time had all the gates wide open. The increase from 235 to 237 occurred practically the last two days. During that period of time we could have let the water out by opening up the gates; but I didn't. That was a matter of my decision.

I saw it was raining hard between the 10th of December and—; I knew it was raining hard. The storm was on all over the Northwest, and it kept

(Testimony of David J. Shore.)

coming down in torrents. There was considerable discussion with the public that a flood was about to be on. As to whether during that period of time I called up the Portland office and asked for instructions,—well, we have our instructions of normal water, which I told you; that elevation varies from that. We keep in contact with the load dispatcher and report our water. We do that every hour. As to whether any time between the 10th and the 21st I called up the Portland office for instructions as to what to do,—well, I couldn't just exactly state that. A fellow would have to have some memory in talking to the office for a month, and didn't ask for instructions in charge of a plant. I don't remember whether I did or didn't.

On the 20th I decided to raise the water up to 236; that was a foot. I told them to bring it up a foot. I gave those instructions to one of the operators at the power house. That foot was done on my own responsibility. I did not raise that foot upon the advice of anybody else. I did not raise the water elevation in the lake any higher upon the advice of anybody. I was on the spot. The telephone communication was off, and it was left absolutely to me. As to whether I still continued to raise it higher then; when I say [108] I was on the spot, the stream flow kept coming up even though I did open them all. It was coming up to the point of the last gate. It did not at any time go over the coping of the dam. As to whether there ever was a time when

(Testimony of David J. Shore.)

we couldn't get out on that walkway along the dam,—we weren't on no walkway on the dam; that was below the dam. The walkway on the dam is where we took the readings after 12:16.

We didn't close any gates to raise the water a foot; we just didn't open a gate, and let the water come up. We didn't continue to open No. 5 gate, and let the water in the pond raise a foot. As the water increased, we afterwards raised No. 5 gate.

The capacity of the big gates is about 30,000 second feet apiece; the little one, about 7. I saw the water passing through the gates with my own eyes. At elevation 237, when the five gates were all open, they were going clear full.

I referred to the conditions in Woodland. I was considering the flood conditions there, from what I saw and what I heard. I had not been considering those matters for several days prior to the 20th, nor till it had reached a peak higher than we ever had before it. It reached a peak on the 10th of December, 1933. That was the first time that I began to observe conditions in Woodland; that was when we was anxious about it. When anything happens that is above normal operation, the operators are naturally anxious about what is happening. At that time we had gates open enough to spill that stream flow; equivalent to that stream flow of 61,000 second feet. We thought of Woodland at that time. I did not go to Woodland at that time to see what was happening down there, but we got reports from Woodland

(Testimony of David J. Shore.)
at that time. The reports came from people living in Woodland. If the water remained at 61, why, there wouldn't be any danger in Woodland. I don't just remember just who was giving me these reports. There was plenty of people calling up, asking us water conditions, at all times,—what we think of the rain, and whether we [109] are going to have more spill, or what have you.

As to whether I recall a man by the name of Mr. Button, he is the banker there in Woodland. Button called me up, asking me what the chances were for more water, and what I thought about the weather; yes. I don't recollect whether he asked me what the chances were for letting out a lot of water in the lake because people were getting apprehensive down below that the dam would go out with the full head on. He did not tell me that the people down at Woodland were beginning to get scared with the way that the water was accumulating in the pond and that they wanted me to let it out. He asked me if—in my opinion what the conditions were; what I thought about the rain and conditions. There was a lot of people called up about the water in fear that the dam was going to go out, but I couldn't operate on those conditions. If I paid attention to anybody that that dam was going to go out, why, we couldn't operate, that is all. They have been more or less panicky about the dam going out since they installed it, to the expense that they put in a siren to give a certain ring if the dam went out. That

(Testimony of David J. Shore.)

happened long before the flood; shortly after the construction was finished. I can't give you an idea of the date upon which the people first began to show they were panicky about the condition of the water in the Lewis River, because as the floods from our spills increase from one spill to another, until they become acquainted with the river, they talked about any freshet. It is correct that I stated here on my cross-examination that in my raising the height of the water in the dam, I had these people below in mind; I meant the people in Woodland; those were the ones I was in touch with. As to whether I was referring to Mr. or Mrs. Grieger,—it meant the same thing to me. It was the people below the power house. The agitation that was on, or the evidence of panic that I saw, was from people in Woodland, twelve miles away.

I remember that I spoke about going down to the fire house; the fire house was practically right on the bank of the Lewis River. At that time the water was not out of the banks of the Lewis River. At the same time we [110] were still keeping a head of 235 feet elevation in the pond. As to whether the reason for impounding the water was not because I had the people in mind but because I had the safety of the dam in mind,—you could run the water twenty foot over the top of that dam, and that dam would still be there. The safety factor of that dam is so far above the actual pressure of the water up to 235, that it is about 5 to 1.

(Testimony of David J. Shore.)

As to the two roadways along the dam,—the Cowlitz roadway going to the dam ended at the bridge. We then crossed the bridge to the Clark County side and a short piece of roadway from the bridge leading down to the plant. The water came down that short piece of roadway on the Clark County side of the bridge. It was not coming from the pond at all. If the pond overflowed it could come over the dam down that way. As to whether that was the water that was drowning us out, or as to whether it was the water coming down the spillway,—well, that was the water that was coming down the spillway. As the spill got higher, it splashed up over the road, it was the water from the spillway that ran down that road; the spillway is on the Cowlitz side. The water hit the bank on an angle from the spillway, and the waves would come up, and this water coming down the road just came in surges; it was not constant. The water backed up from this, in this gorge, and flooded us out. What drowned us out as far as our power plant was concerned, was the combination of the water backing up the gorge and a portion of the water from the Cowlitz spillway coming across and striking the bank, and then coming back; it does not come across. There is an angle in there, and it curves; the way the spillway was made, and the way the gates is operated, has a tendency to make most of that go pretty straight past

(Testimony of David J. Shore.)

that rock point you are talking about. What drowned the plant out was the water from the spillway splashing over that road where the bridge was.

I said that the gates could be closed by hand. We did not close them by hand on the night of the 21st. We had, as I said, the house machine running until we opened that last gate. Eventually the gates were all open. [111] We closed them at 2 o'clock the next afternoon. I do not recollect what the elevation of the water was at the time we closed them; I can find out. At that time the elevation was 235.07. We started to close them at 2 P.M. on Friday. We did not try to close the gates by hand. The reason we did not try to close the gates by hand was because under the weather conditions, the amount of rain we was having and from past experience, I did not think it was advisable. Every indication was that we may have more water. It is absolutely not a fact that we could not close the gates by hand.

We did not have a crew of The Portland Electric Power—; we had our own crew up there.

As to how we closed the gates on the 22nd, on Friday, starting at 2 o'clock, this chart shows No. 1, 2, 3 and 4 up 26 feet; No. 5 up 15 feet; that was midnight. We did not start to close them until the next day at two; that is Friday afternoon, after the peak, we started to close the gates. As to how the gates were shut off, I don't get all the readings here though. This is at midnight. We started to close the gates at 2:00. You want readings at each closing, all the way down. Now these notes

(Testimony of David J. Shore.)

were taken while we were operating on top of the dam during the time from the peak of the flood until 2:00 P.M. that we started to lower the gates. When I say that we were on top of the dam, I mean where the gates are, the mechanism for operating the gates; and at 2 o'clock P.M. the elevation was 234.90, and gates 1, 2, 3 and 4, were then open 26 feet and No. 5 was open 20 feet. That would let a spill of about 112,600 second feet go through the gates. At 3:00 the elevation was 234.95. The spillage was practically the same, and gates 1, 2, 3 and 4, were opened 26 feet and No. 5 was open 20½. That reading was 3 o'clock. This reading says that at 3 o'clock the spill was 112,600. At four o'clock the elevation was 234.75; the spilling was the same and the gates were the same. At 5 o'clock the elevation was 234.60; spilling 112,600 second feet and the gates were the same. At 6 o'clock the elevation was 234.50, spilling 112,600 second feet, and the gates were the same. At 2 P.M., we had the power [112] to change the gates. As to when we began to close down the gates, well, at 8:30 is the reading of the first gate partially closed. At 8:00 P.M.; elevation 234.05, spilling 101,000 second feet; gates 1, 2, 3, 4 open 26; No. 5 open 14. It was 20 on the last one. That reading was a half hour reading on account of the change in the gates; that was 8:30, the last one I gave you, and at 9 o'clock elevation 234 even; spilling 101,000, and 1, 2, 3 and 4 open 26½; No.

(Testimony of David J. Shore.)

5 open 14½. At 10 o'clock: elevation 233.85; spilling 101,000, and the gates were the same. At 11 o'clock: elevation 233.70; spilling 92,700; gates 1, 2, 3 and 4 open 26; No. 5 open 8½. At 12, midnight: elevation 233.60, spilling 92,700. At 1 o'clock: elevation 233.5, spilling 92.000, gates 1, 2, 3 and 4 open 26½; No. 5 open 8½.

The spillway was estimated by the area of the gates, the size of the gates. The maximum spillage at 11:15 A.M. on the 22nd was between 127,000 and 30,000. Say 130,000. We have a record that is here. I have got it here at 12:15 on the 22nd,—10.516 acre feet. I don't like to figure how you convert that into second feet; the engineers can figure that. It shows in my log book as spilling 100,000 at 11 P.M., and it is in that small sheet I just read you out of. It is a fact that immediately after the opening of all of the gates, the elevation of the water in the pond began to decrease or fall something like from 237.6 to 233.5 in a twenty-four hour period; I don't just recollect the figures, but it dropped.

(Re-Cross Examination by Mr. Evans)

The figure that you call my attention to in my log book shows 127.200 feet at the peak, at 12:16. Before I decided to let the water rise that extra foot on the night of the 20th, I had a conference with someone at Woodland; it was the Mayor of Woodland. Fred Brandt, the manager of the telephone company, was also there.

(Testimony of David J. Shore.)

The peak of the flood was at midnight on the 21st. Up to midnight on the 21st, on that day, we stored between five and six thousand second feet. If we had turned that loose according to stream flow, the peak of the flood [113] at midnight would have been greater than it was.

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Thereupon

LYMAN GRISWALD,

a witness for plaintiff, being first duly sworn, testified as follows:

(Direct Examination by Mr. Lord)

My name is Lyman Griswald; I reside at Portland, Oregon. I have lived there twenty-five years; I am a civil engineer; I take general employment, independently of any single employment. I have been employed both by the Northwestern Electric Company and by Inland Power & Light Company.

As to whether I had anything to do with the construction and the formation of the plans for the completed project known as the Ariel dam,—well, I located the Ariel dam in 1921, and I made or constructed or directed the making of all of the investigations on the Lewis River, up to the time of the beginning of the construction, which was about November 1st, 1929. I did all of that work for the Northwestern Electric Company. I cannot tell you exactly when the Inland Power & Light Com-

(Testimony of Lyman Griswald.)

pany came in on it; it was sometime in the early part of 1930, after the construction of Ariel started, that I got the instructions to charge the Inland Power & Light for my services. I would not say that I had access at all times to the records that were made prior to the dam, that is, the observations that I took; they are not in my possession now. I suppose I could go to the Northwestern and secure the plans.

The storage capacity of the Ariel dam is about 400,000 acre feet; I do not remember definitely, but about 400,000 acre feet. The lake itself is 12½ miles long; at its widest point it is about a mile and a quarter. It has numerous arms or branches that go out and come back; in general, short ones. Lake Merwin covers not quite four thousand acres, around thirty-nine hundred at elevation 235. I have no record of the average depth of the lake. I know the maximum depth in feet of the lake. If the bottom of the river is where it was when I saw it last, back of the dam, it is a hundred and ninety-five feet deep when the water is at elevation 235. [114]

I was identified with the company engaged in the construction of the dam. It was under the direct charge of Mr. Lincoln, who was the construction manager. Mr. Lincoln is dead. As to who was next in authority in the construction of the work, speaking from the engineering supervision that would be exercised by the owners over the plant, I guess Mr. West, locally, and Mr. Merwin, vice

(Testimony of Lyman Griswald.)

president and general manager of the Northwestern Electric Company, was superior to Mr. Lincoln. Mr. West is located in New York, as far as I know. The plans and specifications were made in New York; they were not designed by me. They were designed by the engineering department of the Electric Bond and Share Company. I was on the job as the consulting engineer for the owner, the Inland Power & Light Company. I don't think it is a fact that the original plans and specifications called for a different location of the power house. As to whether it was taken into consideration in the designing and the construction of the dam and the plant, that the power house might be drowned out or flooded out upon the location upon which it was placed,—it was not considered probable at all.

(Cross-Examination by Mr. Evans)

I testified this morning in my examination in chief that I made the investigation of the watershed and the river there to determine the feasibiilty of this project. I would say I put in half of the time between 1921 and 1929 in investigating the conditions of the Lewis River before the dam was located. As to what I did in making that investigation,—I had numerous survey parties in the field; I established recording stations at different points, and I personally investigated the river for any features that might be of interest. I examined the history of the river as to past floods and freshets,

(Testimony of Lyman Griswald.)

in so far as I was able to. I examined into the rainfall and the extent of the watersheds. I examined into the flood flow of the river with a view to determining what had been the historical peak flood of the river, and ascertained that the peak of the largest flood known, and recorded, occurred in December, 1917, was about 60,000 second feet, measured at Amboy. The flow at Ariel is roughly ten per cent bigger than that of Amboy. [115] From my entire investigation the peak flow of the river at Ariel would be 66,000. In drawing the plans and in constructing the plant, they actually made the capacity of the gates, through which they could spill water, about 130,000 second feet; roughly twice the biggest flood we knew. It is common practice among engineers to provide spillways double the capacity of the highest flood known.

(Re-direct Examination by Mr. Lord)

I got my information about the 1917 flood from the U. S. Geological Survey; that is what I call a recorded flood. That was not the only source of my information. I talked with settlers in the valley, and I examined log drifts and high water marks. The best evidence I could find were the log drifts. I considered all those factors; I considered every factor that could enter into it. I found the log drifts along the river.

As to what settlers I talked to,—I talked with Ole Peterson; he lives not quite at the end of the

(Testimony of Lyman Griswald.)

road. He is up near Swift Creek, about two miles above the road. I talked with Fred Schroeder, who is now Mayor of Woodland. At that time he lived up near Cougar Creek, a few miles above Ariel. I did not buy any land from him in connection with this dam, so far as I know. I talked with a man named Albert Haller, who owned some of the property that now is in the reservoir. I talked with Mr. Hanley, who maintained the Amboy gauge for a number of years; with a man named Wall, a timber cruiser and logger, with whom I had had extensive dealings; also with a man named Frank Reid, who was born and reared on Cedar Creek, which flows into the Lewis River about three or four miles below Ariel. I talked, no doubt, with others who I don't remember now, of course. I didn't make records of those. I did not talk to Mr. Thiel, who lives below Woodland. I don't know him; I don't think so, I don't recall the name. I am pretty sure that I don't know him. As to whether I talked to any of the old ranchers along the river, or men who have lived on the river since the pioneer settlements, say in the fifties,—yes; Frank Reid is a man who must now be in the sixties. [116] He was born there on Cedar Creek, and has spent a good part of his life logging on the Lewis River. Loggers frequently log during freshets in this land; they depend on freshets to carry the logs out very often. I did not find out anything about the flood of '64; I don't re-

(Testimony of Lyman Griswald.)

member a talk with anybody what knew about that flood. I don't think I could name offhand the big floods that this country has had since the 60's. I have a record of them in the office, but I don't recall them now. I considered it from the evidence that I found. I considered that 1917 flood the highest in the modern history of the river. I heard about the flood of 1894. So far as I could find it was not as high as the flood of '17. The investigations I mentioned determined that. I made no special investigation as to the flood of 1896.

The Lewis River drains an area of about 750 square miles above Ariel; that includes some mountain peaks. It gets about one-sixth of the ice cap of Mount Adams, and about half of that of St. Helens. I doubt if it is a fact that the greater portion of the water comes from Mount Adams; I think most of it comes from St. Helens. I couldn't say off hand how far away Mount Adams is from Ariel dam by the river; I suppose it could be measured. If I had a map it could be done all right. This map, which you hand me, marked plaintiffs' exhibit No. 16 for identification, I never saw before, but it looks like a very fine map. It shows the course of the Lewis River. This map is put out by the Director of Highways, of the State of Washington, Mr. Murrow. I don't know how it is pronounced. I find Mt. Adams on that map. I do not have a rule by which I could measure off the distance be-

(Testimony of Lyman Griswald.)

tween Mt. Adams and Ariel dam, but it is roughly 60 miles. This river is shown rather direct on here, but it is roughly 60 or 70 miles above the Ariel dam. Muddy River is the largest stream flowing onto the Lewis River from Mt. St. Helens, and Pine Creek is a smaller stream that flows in above the Ariel dam.

(Thereupon, plaintiffs' Exhibit 16 for identification, a map of the Lewis River drainage area, was admitted in evidence and marked Plaintiffs' Exhibit 16.) [117]

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Thereupon

DICK DAVIS,

a witness for the plaintiffs, being first duly sworn, testified as follows:

(Direct Examination by Mr. Lord)

I reside four miles below the Ariel dam. I have lived in this district 42 years. I have been living four miles below the Ariel dam and a mile or a half mile back off of the road. I work for the State Fish Hatchery there. I was subpoenaed to come here as a witness. I was living there in December, 1933. I had occasion to observe the height of the water in the Lewis River a day or so before the big flood. I couldn't describe the height of the water. It was high; it was high water. I would say that the water was below the roadway on the 20th; the road-

(Testimony of Dick Davis.)

way runs along the banks of the river. It had been raining pretty hard before the 20th. I couldn't say how long the rain had been keeping up; it had rained for several days. The weather was warm for that time of year. Where I was, I believe it was warm enough to melt snow. The roadway parallels the river at that point. When the water was at the ordinary stage I would say it was 6 or 8 feet from the top of the water to the top of the bank. The water was pretty well up on the 20th. It was not in the road; I don't know just how close it was. I saw it the next day, the 21st, at 7:30 in the morning. It was then over the road. I don't know how much; I would say six or seven feet. I don't know as I observed any floatage in the river on the 20th. On the 21st, there was drift running.

(Cross-Examination by Mr. Evans)

It was at 7:30 in the morning on the 21st that the river was six to seven feet over the road; it did not wash the road out. Drift was coming down the river on the 21st. I couldn't say exactly what that drift was; there was three cottonwood trees that grow along the bank; I suppose they had been washed out on the 21st. I could not say as to whether that condition prevailed pretty much all of that day. I was at the fish hatchery till probably noon, I guess; I don't remember exactly. We went down the river at noon. I could not say as to whether I observed drift in the river all the way

(Testimony of Dick Davis.)

down as I [118] went along; we were following a house that floated away, trying to catch it. Before it floated away, that house was setting on the lower ground next to the road, in the vicinity of the fish hatchery. I would say that we followed it a mile. We followed probably to about a mile above the Grieger property. As to whether in following this house we were along abreast of it,—we saw it only a couple of times; we were in a car going down the road, but it was in the river. I couldn't say whether there were trees floating in the river whenever we saw it; there was driftwood, I believe. We did see cotton wood trees up by the fish hatchery that had very apparently washed out that day. The river was cutting into the banks.

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Thereupon

FAY M. GRIEGER,

one of the plaintiffs, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

(Direct-Examination by Mr. Lord)

I am one of the plaintiffs in this case. I am a dairyman; I have followed that occupation for 15 years. Before that I handled cows some as a young fellow on the farm, and then later on I lived in the city, and in 1920 I went back to dairying. There was a period of time that I was in the army; that

(Testimony of Fay M. Grieger.)

was before I bought this place in November, 1920. I had not lived in that community before 1920. I was born and raised in Missouri, up until the time before I was in the army, a little while before I came to the Coast, and I lived on the Coast from 1918 to the present day. I went into dairying in 1920, when we moved on that place there, and I have been living on the place on Lewis River ever since.

As to how many acres the place holds,—we had a deed to 101 acres. There were 101 acres on the place, and more. I have lived there ever since. My wife and I own it. There are two residence houses. When we went on to the place there was one farm house that stands practically on the southeast corner, that is, a little east and a little south of the boundary line there; and then later on I built a residence for myself about a thousand feet west [119] of that; that was built in 1931. My answer as to the location of the first house was an error; it should have been north and west. The house was on my property. It was an old farm house at that time, and later on we raised it and put a concrete basement under it; it has been occupied ever since. The new house is built on my property, and I am occupying that now. My father lives in the other house. My mother died a little over a year ago, and my folks lived there to that time, and my father has lived there since.

(Testimony of Fay M. Grieger.)

As to whether the buildings have anything to do with the size of the place,—yes; we was running the dairy plant at that time, selling market milk to Portland, and the inspection there requires that we have certain specifications in our barn; that is, we must have concrete gutters, runways back of them, and they must come up to certain specifications; that is, we must build a milk house to handle our milk in cooling it, and to take care of our milking equipment; and in 1930 I built a new barn where the old barn stood; that barn is 47 by 80. It will hold in the neighborhood of 40 cows. The loft will hold in the neighborhood of 120 ton of hay. When we first moved on to the place, I bought hay for a year or two; and after we were on the place I cleared more land and we always got our hay from that place, then. When we went on the place I think we stocked it with fifteen or twenty cows, and from then on I increased it up to the time of the flood we had in the neighborhood of 42 head of cows. Under the conditions then it would not run any more cows than that; it was running about all we could handle at that time. The barn was built to accommodate that number of cows.

There are other buildings on the place; there is another small barn, that I built to keep the horses in and the young stock. The city milk inspection in Portland requires that if you keep your horses in the cow barn they must either be boarded off solid

(Testimony of Fay M. Grieger.)

from the cows, or else keep them in a separate place; so we built this special barn for the young stock and the horses; and then we have two chicken houses,—one chicken house is 100 by 24 and the other is 100 by 24. We have other small buildings there, such as feed [120] house, calf house, and a couple of small brooder houses, and one bunk house where the hired help stay at times. The buildings on the place were designed for a place of 101 acres, and they carry maybe a little more stock than we were carrying.

With reference to our place, the Lewis River flowed on the east boundary, or the boundary line run from the county road back to the river on the north, and the river there runs northwest, and on the northwest corner it turned and come back down on the west side. The general course, right there, is northwest. During the period of time that I have lived there prior to Christmas, 1933, the river had not cut into the banks of my property.

As to the so-called jetty that has been described here,—well, if I could present this sketch that I made on wrapping paper I probably could explain a little bit about the thing they call a jetty, which is not a jetty; it is a sheer boom. I could not say exactly when it was put in, except that I have heard after I was there. It was there when I came on the place. As to whether or not at that point the water had cut into the land or had carried part of the top of the soil or anything that way,—that jetty is not

(Testimony of Fay M. Grieger.)

directly back of my place. That jetty sets—the farthest point downstream, which is out in the river, sets back of my neighbor's place. The jetty at the nearest point is approximately 150 feet above my line, the east boundary line.

I know the character of the soil on my property. As to whether I have become a soil expert,—well, I know soil when I see it. I know the kinds that grow and the kinds that do not grow vegetation. I know what is known as sandy loam, and silt loam, and such types of soil like beaver dam and clay and red shot. The soil on my place is what is known as a silty loam. There was some portions on the bank of the place where there was some sand, but more of the place was composed of silty loam.

I judged the reasonable market value of such land as mine with [121] the buildings on it in the year 1933 was in the neighborhood of $22,000. I know the value of other lands in the neighborhood of the same kind, by the acre, regardless of buildings. Some of that land was valued around $200.00.

The land down on the other side of the railroad tracks four miles away is the same texture as my land; the only difference would be that it is a little closer to the Pacific Highway than I am; probably two miles. It has a gravel road by it, and there is a gravel road by our place.

In the early part of December, 1933, I was home on the place, I was down near the river off and on

(Testimony of Fay M. Grieger.)

all of the time during the month of December. As to what would take me down there,—well, we got our cows, and I went along the river bank practically every day, going to town and back. I observed the condition of the weather in regard to moisture. It was raining quite a lot during that time; sometimes it would rain quite heavy. The temperature was very warm for that time of the year; it was warm enough to melt the snow on the high places; there was no snow that could be seen on the high hills there. I observed the condition of the height of the river along about the 10th of the month. The river at that time was fairly high, and some water had backed in over my place at one time. It did not stay there but a little while at that time, and it went over the road on one place down about three and a half miles down the road. As to whether its height increased from day to day along up until the 20th of the month,—well, that was the only high water we had between those dates. It kept on raining between the 10th and 20th; it rained quite a lot then and was warm, and there was hardly any water coming down the river at all then. I noticed the condition of the river on the 19th. On the 18th the water was down. It had not come up very much then. On the 19th the water had raised quite a little, and it went over the road in a couple of places; and then it dropped back down some. It went over the county road one place about a half a mile from Woodland, and the other place was

(Testimony of Fay M. Grieger.)

around a mile and a half below me towards Woodland on the Clark [122] County side. On the 19th it was up. On the 20th it was about the same height, and on the 21st it came up quite a lot on that day. I observed it first in the morning; it was up further than it had been any time during that week.

Up until the 21st the current had been running out in the channel more. There was some water over part of the ground at that time, but the current was way out in the channel of the river. Prior to the 20th it was not cutting away any of my land. I did not at any time observe the current cutting away any of my land up to the 21st; I noticed it on the 22nd. We stood on the hill above the water, and we could see it taking the trees which was down on the northeast corner. It would take out trees right along there. Then farther up we could see some of the soil going there. It was warm there. I saw the waters subside on Friday; on Friday afternoon it dropped some, from practically 2 or 3 o'clock it dropped quite a little. I saw it wash practically two channels through the land at that time; you couldn't see clearly then yet. Until Saturday we couldn't tell much about it, but as the water went down further, then we could see the extent of the wash that it had made there. It subsequently dried off. Where we had our farm land, and which had been fenced in by woven wire fence, we found that we had no soil at all. It was washed clear to the gravel in there, and up further to the

(Testimony of Fay M. Grieger.)

south it had cut or washed out chasms at two or three different places there. It hadn't washed quite as deep there, but in different places it cut up the land quite a lot there.

These pictures handed me, which are marked plaintiffs' Exhibit 1 to 7, were taken on my property. I saw them taken. I was down there when they were taken; in fact I am in three of the pictures. The man standing along the bank in three of these pictures is myself. Prior to the flood the condition of the soil where I am standing was level soil. When the river was at normal flow I would judge it was 10 or 11 feet above the river. Now it is probably a foot, or a foot and a half, above the river. If the water comes [123] up any at all it will use it as a channel. The soil in there was silty loam; the best soil I had. I haven't found anything that anyone would now recommend raising on it. That is the place where it is worn down clear to the gravel. Driftwood was throwed up all over the place there. In one drift pile we counted 21 trees; they were all sizes anywhere from four inches up to a foot and a half through. There were three or four big cottonwood trees washed in there. Three of them is still on the place there. One was washed up on top of two apple trees there, and was resting there after the flood, and two of them are laying up on a big sand pile there. There is some stumps washed in there also. Sand was washed in all over the place. Some of the piles of sand is as deep as

(Testimony of Fay M. Grieger.)

five and six feet high; anywhere from six inches up to six feet; most of it is a coarse sand. Once in a while you will find a little finer sand with no silt or anything in it. It is not capable of producing anything. It is a detriment to the soil because you can't raise anything on it. It has the soil covered up, and stuff couldn't grow through it at all.

Approximately around 45 acres of my land was washed away, and I would judge in the neighborhood of 30 or 35 acres of it was covered with sand. As to whether that that has the sand on is used for any purpose,—the cows run over it once in a while, but nothing will grow on it.

There wasn't any side of fences left. We found part of the woven wire fence, maybe two hundred feet of it, piled up in the driftwood. We couldn't ever find any of the rest of the woven wire fence at all, and we found maybe one or two of the barbed wires and the cross fences. I had just finished the woven wire fence in June before the flood; there was around 120 rods of it. They were new posts; we put new cedar posts in the whole fence. A cedar post is supposed to be the best type outside of steel posts. We figure the cost of putting in the fence, and the material, and everything in the amount of about $450.00. [124]

We had oats and vetch at that time, for hay, that we would have harvested the next year, and we had a small crop of clover on the place; there was in the neighborhood of 34 or 35 acres. The reasonable

(Testimony of Fay M. Grieger.)

value of the crop would be in the neighborhood of $800 or $900 when it was harvested. There was some timber on the premises; some fir and some cedar, and here and there was cottonwood scattered through, small trees, a lot of it washed out there. The reasonable value of the timber that I lost was in the neighborhood of $200.00.

Exhibit No. 17 for identification, which you hand me, I recognize as one that was taken under my direction. That depicts the type of sand that is on the place. That sand washed in there during the night of the 21st and the day of the 22nd.

(Thereupon Exhibit No. 17 for identification, a picture showing sand on plaintiffs' premises, was admitted in evidence, and marked Plaintiffs' Exhibit 17.)

Exhibit 17 was not taken on the part of my land that was washed away; that is some of the land with the sand piled on it. Right in back of that mound, right back of me, is a pile of sand. There is a log and a stump laying right there where I am standing; that is sand.

I have prepared a sort of sketch of my place; it shows the section where it was damaged,—well it shows the whole—I made a sketch of the whole place from the county road back to the river. It shows an outline of the land, and I tried to show where the ground was washed out there. I will try to show the way my place lays with reference to the river.

(Testimony of Fay M. Grieger.)

The sketch shows the turn of the river and the channel of the river before the flood. It shows the lands that have been cut into. This map isn't drawn to scale; it is a sketch. The boundaries of the land is defined there. I didn't have any survey or any measurements made as to the actual quantity of land washed over; I didn't have the means and so forth to make that. I [125] think your company has one that they have made.

(Thereupon Plaintiffs' Exhibit 18 for identification, a sketch of plaintiffs' land, was admitted for illustrative purposes only, and was marked Plaintiffs' Exhibit 18.)

Referring to this sketch, the county road is on the south here. The county road runs, comes from this way (indicating). This is going towards Woodland, and it makes a turn here and goes down west. Down this way it makes another curve and goes up towards Woodland then. This is on the Clark County side. This piece of land lays on the Clark County side. The Lewis River is the dividing line between the two counties. What land lays on the south of the Lewis River is in Clark County, and that on the north is in Cowlitz County; we, being on the south side of the river, are in Clark County, so this road here is in Clark County. There is another road on the Cowlitz County side that runs along the Lewis River approximately there (indicating). All of my lands lays on the Clark County side; I show no land on the Cowlitz County side of

(Testimony of Fay M. Grieger.)

the river. The river, as I said, comes here and flows northwest. This land in here was originally a donation land claim from the government. It was made to the people that settled there; there was 140 acres in it originally. My land is approximately 1300 feet from the east to the west boundaries. Down in here it angles out, and it is further across here (indicating). I never made any estimate of that distance down in there, how much further that is. The other way the distance is around 120 rods (indicating). I should judge the river travels clear around in front of my land in the neighborhood of three-quarters of a mile. The river runs down this way, and it comes to this point here and goes down this way (indicating)—curves back and goes down this way (indicating)—, where the red and the black line are together.

The water cut off the back end of the place next to me, and come across the corner here, and cut here (indicating), these marks made here with [126] the pencil, or where the river cut clear to the gravel, this space through here, practically (indicating). This space in here that I made blue is sand piles here. Up this way further is where it had cut out chasms. There is no gravel in here except in a few places where there is an outcropping of gravel where it is real deep. The other places it has not cut through the gravel there. When I speak about a chasm, well—you go here, and there is a big hole, quite wide and long in places, and then other places

(Testimony of Fay M. Grieger.)

there will be smaller holes, and they will be different sizes there. There is one long one here I have shown, and there is another one over here, and I think in here is one (indicating). I haven't shown all of them; these are around four and five deep here. This one over here varies from three feet. The timber that I referred to laid down in here. There is some timber left in this space here yet (indicating).

The houses are indicated by those square marks. This house here is a house that we originally owned. This house was raised and we put a concrete base under that. That is the house we live in, which we built later on. This is where the dairy barn stands, and I haven't shown here the little milk house which I spoke of. One chicken house lays this way from the barn, and the other one this way. That would be best. And the small barn that I spoke of for the horses, and young stock, lays down this way, and the bunkhouse for the men is in here. Then the smaller buildings, like the calf house, I haven't shown. That is shown approximately here on Plaintiffs' Exhibit No. 5 at the point I have marked No. 5 on the map.

Exhibit No. 3 was taken a little further down towards the river. You will notice the pool of water standing here; this comes under the drainage from the river. The river raises and lowers, and this little pond here will raise and lower. That picture was taken the 28th day of September, this year.

(Testimony of Fay M. Grieger.)

Plaintiffs' Exhibit No. 2 is not illustrated on my map. This was [127] taken over here in this district, and was taken from the timber which I said was still standing down in here (indicating). This shows the timber down along in here. I will mark this on this map "2". Before the flood there was tillable land covering those rocks that are shown in the picture; in fact it was part of the field that was fenced. Those rocks shown in exhibits 1 and 7 were brought upon the land because of the flood. At the ordinary stages of the water I should judge that that land was around 40 rods away from the water here. I have never found any value for these rock beds; I don't know what they would be valued for.

I know the reasonable market value of the place after the flood. It is just a place to live. I don't know that you would get anybody to buy it. I wouldn't judge it would be worth over $1,000.00 or $2,000.00. About the only value you would get out of it would be in the lumber of the buildings.

(Cross-Examination by Mr. Evans)

I now have in the neighborhood of 30 head of cattle. I pasture them on three places, on Ross island and part of Jim Ross's place. I imagine there is in the neighborhood of 110 or 120 acres on Ross Island. Part of it is owned by Jim Ross, and part of it by me. Part of the soil is silt, and some of it

(Testimony of Fay M. Grieger.)

sand. Maybe 10 or 15 acres is silt soil. I own 66 acres of that. I bought it in May of this year, and paid $1,000.00 for 66 acres. I said maybe 10 or 15 acres of it is silt and loam. I contracted for another little piece so that I could get across to the other; that adjoins my present land on the west. The soil of that is sandy. I don't think that there is any silt on that place, and no pasture. The cattle run over it, and there is no pasture of any value on it. I bought it to get across to my place over there. I paid $550.00 for it. The acreage of that is 22½, I think; 22.

That place is an old donation land claim. I am somewhat familiar with the history of the place from others. My deed calls for 100.6 acres. This map doesn't purport to be confined to the 100.6 acres. I think in a [128] short time I can draw in with a pencil the 100.6 acres that I described in my complaint. I will mark that line "A" at one end and "B" at the other. This line here should come over in here a little. It washed out over there. In here is the wash I am talking about (indicating). I have not had that measured at all. This map does not purport to show the proportion of the ground that was washed over. I stepped off the acreage so that I could figure it; I did not measure it at all; I did not have any steel tape. I figured out the acreage with pencil and paper, but only from a step off. I am including damage to this land below the line; it is covered with sand, too, down here.

That is not included in my description of the land in the complaint. There is quite a gravel bar there north of the line "A" and "B", there are approximately fifteen or twenty acres north of the line, that is not in the call of the deed or in my complaint.

I do not know anything about the old channels of the Lewis River that used to cross my place; how would I know? Prior to the 1933 flood, I could not tell from observation of my place where the river had been in other channels. I do not know that in 1853 the channel curved around some part of the land that was washed out; I never heard of that, and had no idea of it. It never occurred to me that where the wash occurred, down to the boulders, was an old river bed; I never thought of that at all.

On the 19th of December, Tuesday, I was home part of the time and was to town in the morning. I did not measure how high the water got up that day above the regular flow of the river there at low periods; it was high. It was high again on the 20th, about the same as the day before; it went out of its banks on Thursday, some. It did not go out of its banks on Wednesday at all; there was some water on the place, but the water that was there backed in from the west side.

The jetty was about 150 feet upstream. Before the flood the soil between my land and the jetty was gravel; there was no washout in there at [129] all. There was a sort of inlet there, that was always in there from the time I came; it is a low place all

(Testimony of W. J. Roberts.)

along the bank there; that was all gravel in there clear up to the bank of my place. The gravel was in the neighborhood of eight or ten feet lower than my place. That is not the place that the river would come in first; it would come in on the west side; I marked it on that sketch. This is not a jetty; this is a sheer boom. The east boundary line is down here, and the sheer boom is right here; it is marked with dots, and I have an arrow pointing up to it. With reference to it, my line is right here. The gravel strip that leads from the sheer boom down to my line is right in here where I have marked with a pencil. The gravel strip is all along here (indicating); that is all low here. When the river comes up it covers this. The river came in here first it always has; it backed in from over on the other side of the place. That is where it came in on the 20th.

The river had not got that far; it came up about here. The new channel or the cut of the wash that I am complaining about started back here by the sheer boom and then came out over my land; the wash started from the sheer boom over in here. The water did not come across on my property there at all from the sheer boom on the 20th; I don't think it did on the 10th. It might for a little while; not any time I seen. The water was not up very long on the 10th, and I was not back on that place on the 10th; I don't know whether the water went up there on the 10th or not. I didn't see it go through to my place in the vicinity of the sheer boom on

(Testimony of Fay M. Grieger.)

the 20th; I was not here; I was up in here (indicating). I did not see whether it went through there or not on the 20th; I would not know if I did not see it. As to how much of the 20th I was there,—it was just part of the time in the morning. I was there at chore time, and then I took the milk to town and came back. I was there in the afternoon or evening; not in the vicinity of the sheer boom. I do not know whether the water went across at the sheer boom, over to where my wash now is, in the afternoon or the evening of the 20th. If anything washed out that night I would have known it the next day. [130]

When I came out on the morning of the 21st, Thursday, the water in there was maybe five or six feet deep; I couldn't just say because down in here is just about as close as I could get to it; that is where I judged, somewhere in that neighborhood. Phillip's land is above me, immediately beyond the line here up river. There is a barbed wire fence around there. This flood went over quite a bit of that land; not all of it. That barbed wire fence would come to about that high (indicating approximately three feet). I was up there after the flood. The flood brought in grass and stuff which caught in the trees and on that barbed wire fence. As to how high the water got on that left-hand bank as you go down the river;—I did not come down that fence on the 20th. Since the flood the water shows on the top strip. I never paid any attention to whether it

(Testimony of Fay M. Grieger.)
would get on some of the bushes there. That is not a good deal higher than my land. Where the wash occurred on my land was not lower than the rest of the ground. As to whether there wasn't a slope there from there, right gradually down to the river, —the slope came down in here, clear back in here, the lowest place on my place, and that lowest place is still there. It came back towards this way, and there was another little low place come back through here. When I saw the current on my place it was running through here, from where the sheer boom was right at my place. There was drift found up there at that time; there was a log in here and there was another log as I said in those two trees there. There was no drift forming back above my place; I know there wasn't any there.

On Sunday, the 10th, a little water went through there from the sheer boom to my place a short time on that day. It came through from the sheer boom, in this way, because that was the way the current was coming, but it changed in this way first to permit this water to go this way, and then it went through; that was on Sunday, the 10th.

I was home part of the 21st. I went to town in the morning and I [131] was home before I went to town, and then I came back home again. I should judge I got back around noon. I was there the rest of the evening and that night. When I got back at noon the water was then fairly high across the place. I would not have any way of judging how high, as I had no sticks out there. The place where

(Testimony of Fay M. Grieger.)

the entire wash of my property is was not submerged from noon on the 21st; it reached that point some time Thursday night. As to how late I was up Thursday night,—in the neighborhood of 10:30. I did not stay up watching this flood at all. If I was not up I would not know how much wash and cutting there was on my property from 10 o'clock to midnight; I don't know. I would not know whether it washed some on the night of the 21st. I saw a lot of the wash occurring the next day, the next morning; I could not tell when I came out there whether a lot of stuff was already washed out. I could tell it was cutting, sure, in here and up through there; it cut practically all of the 22nd. All that day of the 22nd. When we first went down in the morning, it was a way higher than it was on the 21st, as soon as daylight that morning; I don't know exactly what time it was.

As to whether I know how high the water got on my place after 10 o'clock Thursday night up to midnight,—well, it was atop of the bank here when we got down here the next morning; it was up on there. It had been a little higher in that place, because you could see the drift right there. That was at daylight, Friday morning, around five o'clock, I imagine; it was not quite daylight. The river had been higher in the night; it went down some that day. The peak of the flood at my place was sometime during that night.

If the maximum flow of the water was turned

(Testimony of Fay M. Grieger.)

loose at 12:16, the peak of the flood would reach my place in a short time; the rate the current was flowing, it would probably reach there in about ten minutes or less, or a little more. I should judge my place is around seven or eight miles from the dam; it had to run seven or eight miles. The peak of the flood at my place was around 12:30 in the morning; the next morning the water was going [132] down a little.

I saw some drift in the river on the afternoon of Thursday; we saw big logs going down; it looked like an old cottonwood tree; it was a cottonwood log; it was not a tree. As to whether I saw just one, —well, there was one in particular; I watched it going down. I did not see anything that had the appearance of being washed out by this flood; not a thing. That log was floating out in the river channel; nothing was going across my place; not then. There was one log up on there where the wash occurred; there wasn't any swale there. The water was going through there some on Thursday; around three or four or five feet; probably somewhere in that neighborhood. As to whether I mean to tell the jury that with four or five feet going through there, that there wasn't any drift but one log,— well, that was all. I don't know anything about it from about 10:30 that night until 5 in the morning.

As to when the river started cutting my place,—I seen it cutting Friday. As to when it first started cutting,—Friday as far as I know. I don't know whether the cutting started at the peak of the flood

(Testimony of Fay M. Grieger.)

on Thursday night, or a little after midnight, or not. I didn't admit that the peak of the flood came shortly after midnight; you said that it—I don't know what you turned loose. I said that if the evidence shows that the most water was turned loose at 12:16 the morning of Thursday, the peak would reach there shortly thereafter. So far as I know that is the highest water that was there. It caused quite a lot of damage during that high period. The water cut all the time it was receding. I don't know whether it cut from coming up to the peak.

I had water in the plant at the barn for my stock; they generally always water at the river. Right off of the highest place there they went down there at the bottom; it was on the west side over there; they go down the hill to the water most of the time. At that time they wouldn't go down [133] to where this sheer boom was, before the flood. In the summer time they would water over on this side, because it was always the closest there, and they went down to the pasture that way. In the summer time they would sometimes go down in that neighborhood to the river where the wash occurred in the vicinity of the sheer boom; they could go down that bank, over the back end. There was a path around there at the back end.

That cottonwood was logged over on the west side there, on the back end there. I don't recall the exact date of that; that has been several years ago, after I got the place.

(Testimony of Fay M. Grieger.)

There was some current in the river across my place on Thursday where the wash occurred; a little. I said the water was somewhere in the vicinity of four or five feet deep. The water covered different widths wherever it would be. Down there at the low places it would cover it more on the west side than it would up on the other end there is some places lower, farther up then where the wash occurred.

This isn't a map; it is a sketch; it is not drawn to scale. The water came practically up this far (indicating); this is the lowest place through here, where I am marking with my pencil "C"-"D", where the water actually came to "C" at one end of the line and "D" at the other; that is the high water mark; the high water mark is up in there. The line "C"-"D" is probably eight feet higher than the wash; so that between the part of my ground which was washed and the point "C"-"D", the depth of the water was eight feet but that was the lowest place on the place there. The damage was all caused in this place where the water come across. The water at "C"-"D" was eight feet deep; I have no way of knowing how deep it was in there in the wash. Before the flood "C"-"D", at the highest point, was higher than the place where the wash is that isn't the highest point on the place; it is the highest point in the district. The distance from the line "C"-"D" down to the wash is approximately eight feet in elevation. As to whether

(Testimony of Fay M. Grieger.)

there is any damage above the line of the wash up to the line "C"-"D", [134] there would be some sand stuff in there. That isn't in that part that I have included in my pictures; there is a little sand there; it isn't shown above that, just a little sand here (indicating). There wasn't any wash up there at all. As to whether the part of my ground at the peak of the flood which was under eight feet of water was not damaged at all,—no, that lowest point in there was not damaged.

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Thereupon

W. J. ROBERTS,

a witness for plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Anderson

My name is W. J. Roberts; I live in Tacoma. I am a civil engineer, specializing in hydraulic engineering. I have been engaged in civil engineering more than 40 years. I am a graduate of the University of Oregon and then the Massachusetts Institute of Technology in Boston. I began engineering in Portland, Oregon, and followed it up by work in The Dalles, Oregon, and Hood River, Oregon, and from that I went up to Colfax, Washington. I was in Whitman County sixteen years, the first three years as city engineer of Colfax, and installing their first water system, and then I followed that with 13 years at the Washington State College at Pullman, and after that I went to Medford, Oregon, and put in a water system there. From 1908

(Testimony of W. J. Roberts.)

to 1913, I was in Olympia with the State Highway Commission, and from 1914 to 1923, inclusive, I was Chief Engineer of the Intercounty River Improvement between King and Pierce Counties; that is the reason they called it the Intercounty, and I was on that nine years. I received a letter in 1917, when the World War was on, to see if I would lay out the sewers and water systems for Camp Lewis, Fort Lewis, right out here 16 miles, and after that I had consulting engineer's work in many counties and cities and places in Oregon and Washington. Especially, I built the Centralia power project in 1929. I don't think I need to run over all that, it would just take time. I can give you the records, if you want them. At Washington State College I taught civil engineering and mathematics. [135]

I have been sitting in the court room all day and yesterday; the first, second, and third. I heard the testimony with reference to the elevation of Lake Merwin reaching a point of 237 feet, and dropping to the point of 233.6. From those figures, with the figures that were submitted for the area of the lake, and what it dropped, I am able to compute the amount of water in excess of the natural flow which was spilled there during that 24 hours: the testimony showed that the area of the lake was 4,000 acres, as I remember it. You multiply the drop by the acres, the average area of the acres in that drop, and as I remember it it was about,—I think it was 16,000 acre feet, assuming that the

(Testimony of W. J. Roberts.)

drop was about four feet. I worked out several problems of that character; that is just a mental problem. I have the notes here; I copied them from my work. You referred to the spillage at the Ariel dam from midnight of December 21 to midnight of December 22. I have it here noted that it would amount to 13,600 acre feet in excess of the natural flow over the said period. In my opinion, then, if the elevation was lowered 3.4 feet, as a matter of necessity the lower part of the river would be burdened with 13,600 acre feet of water in excess of the natural flow; that was over a 24-hour period.

One second foot of water over a period of 24 hours will cover two acre feet. That is the volume, we call it; the other is the flow. When you speak of the flow of water you mean cubic feet per second. If you want it measured in capacity, that will be two acre feet in 24 hours. The excess was 13,600 acre feet, in excess of the natural flow in 24 hours. To convert that into second feet, divide by 2; that would be 6,800 second feet in addition to the natural flow of the stream. When we speak of that we always mean over a 24-hour period. The statement was, that it was a 24-hour period near the time of the peak flow that was spilled out of the dam.

I heard the testimony that the average or mean flow in second feet on December 22, 1933, was 114,000 cubic feet per second. The maximum was of course much greater than the mean; it always is. I have the maximum [136] flow right here before me,

(Testimony of W. J. Roberts.)

—a certified copy of the Federal Government, for the year ending September, 1934, which goes back to October, November and December, 1933, and that was the period you want to cover, the average for the 24 hours on December 21st, up to midnight, was 114,000 and the maximum was 129,000 cubic feet discharge, cubic feet per second.

I know only approximately what the height of the dam is; I think it is 235 feet. I think they use the U. S. G. S. datum, which is the mean sea level. I do not recall the elevation at the bottom of the dam with reference to sea level; I don't think it has anything to do with the problem. The water did not spill over the dam; it spilled down the spillways.

I have viewed the Ariel dam, and have seen the gates. I have not observed the gates in that dam structure. I know the size of the gates; I have a drawing of them. They are the ordinary radial gates that are closed and opened as needed. As the gates are opened the water would fall from the bottom of the gate to the bottom of the river. I couldn't say right off-hand how far that is. I think I could answer that if I would review the drawings of the book, because if I carried all the figures that I use daily I would have to have a book to keep account of them. I have the openings, the size of all these five gates, and if you want me to read it to the jury—they were made by authority. As to how far the water falls,—well, these gates open—the normal storage level is 30 feet above elevation 205 feet.

(Testimony of W. J. Roberts.)

These notes to which I am referring were not made upon the hearing; these are the drawings of the structure of the gates and the dam; they were made by my assistant under my direction about April, 1934; I was there at the time they were made. I might add to that, to make it clear to the court and the jury, if it is permissible, that there were obtained from the Hydraulic Engineer of the State of Washington, the notes about the size and openings, and they agree, accord, exactly, with the testimony that has been given here. [137] I got them from the records myself. There are five gates. When these gates are wide open the water falls from elevation 205 to the bottom of the river channel; which I cannot tell what its elevation is,——.

As to what effect that fall would have on the lower stream,—well, the falling of that water adds to the water of that stream. If you mean as to velocity or impact, or something like that, you may know that water is very inelastic, and that it will have a considerable slow-down before it goes very far from the tailrace—we will call it, because that is what it is, a tailrace. It would have some effect on the velocity of the stream; increase it a little. The more slope, to explain my answer, the steeper the slope of the stream, the swifter the velocity of course. In my opinion the mean discharge of 114,000 cubic feet per second would have sufficient force to be a competent force to cut away land, with the velocity that the stream has. I want to explain, I think the Court will permit me to do

(Testimony of W. J. Roberts.)

that. The erosion depends of course upon the velocity of the stream. Erosion on the banks depends upon the velocity of the stream, and not the height of the stream, but the higher—the fuller the stream is, the more water flows, and then the swifter it becomes. They go together.

Cross-examination by Mr. Evans

If I go over all my experience in hydraulics, it will cover a period of more than forty years. As to what my experience has been—well, sewerage in the big cities of New England; sewers, Boston, Massachusetts, and Ashland, New Hampshire. I never had charge of the construction of a power plant, no; sewers; you have to know the velocity of that to know the diameter to build it. I said I had something to do with the power plant at Centralia; that is a little power plant. They take the water out of the Nisqually River, the same as the City of Tacoma does; I was the chief engineer of that: that is all. I made the plans. I don't just remember how large a plant that was, but I think it was about 2,000 H. P. The dam there is a very low dam, compared to the Ariel dam. I think it was about 10 feet high. [138] It was not an earth dam; it was a timbered crib dam. As to whether between rock walls or earth walls,—gravel, I would say a hardpan. The Nisqually River has a very steep slope. This water was taken from the Nisqually River, and Nisqually River has a very steep slope, so in four or five miles of channel it would have about

(Testimony of W. J. Roberts.)

200 feet to fall on the water wheels. The dam was about 12 or 14 feet high overall. I think it had a flood gate. It is six years ago, and I have have a good many other things to contend with since then. I cannot say definitely, but I think there is a flood gate. I have been doing hydraulic work every year since I graduated at M. I. T. in 1891, 44 years ago.

I went up to the Ariel dam in order to prepare myself to testify in this case, a little more than a year ago, and again this year, on the Friday before the case was taken up on Tuesday. I spent an entire day there on the first trip. I got in on the dam, between the parapet and the top of the dam. I could not say who let me in there; I could not even say whether a gate was unlocked to let me in; I made a request, it was granted, and we had no trouble about seeing what we wanted to see. I did not investigate the character of the dam. I did not spend my time looking up the operation of the gates; I did not pay any attention to them while I was there.

We went down the river from there to the Grieger place; we followed the road down to Woodland, and then came up from Woodland to the Grieger place and went all over the Grieger place. I did not make any survey down there, or have any survey made under my direction. I did not have any cross section made at or near the Grieger place, or at any place. I did not have any measurements made which would show me the spread of the water after it gets on to the Grieger place.

(Testimony of W. J. Roberts.)

As to my knowledge of the elevation of the dam, I know only what the authorities have prepared and show here. As to whether I know the elevation of the Grieger place of my own knowledge,—well, I think I can give [139] it to you, if I take time enough, from one of these quadrangle sheets. I have one for Clark County. I have investigated it but I did not commit anything to memory. I can find it on some of the maps I have here. As to what I would have to do to determine the difference in the elevation of the dam and the Grieger place,—why, every government map I have has "BM" on it, and you know what that means. It means Bench Mark, and the elevation is written alongside of it. As to whether referring to it now, to tell you the difference in the elevation between the Grieger place and the base of the dam,—I cannot tell about the base of the dam; the top of the dam. Call the top of the overflow 205. If I can have that quadrangle sheet of Mt. St. Helen's area I can tell you the drop from the 205 foot elevation on the dam, between that and the Grieger place. I think that forestry map would be all right, if I could be excused a minute, the Columbia National Forest. They have all kinds of bench marks. Now, this is called the south Mt St. Helen's quadrangle. Now there is Mt. St. Helen's (indicating on map). The map I am referring to now is a Federal Government map that is published under the authority of some authority at Washington, D. C. It is called the Mt. St. Helen's Washington Quadrangle.

(Testimony of W. J. Roberts.)

(Thereupon a government map of the Mt. St. Helen's quadrangle was admitted in evidence and marked Plaintiffs' Exhibit 19.)

Well, pointing out to the jury, there is Mt. St. Helens, and the map is identified at the bottom as the Mt. St. Helens Quadrangle. Now, I have with me also the Mt. Adams Quadrangle, which is farther east than Mt. St. Helens. The Lewis River, well, I guess I am going too far; you want to know the difference in elevation at the Grieger place and at the 205 foot level on the dam. I don't think it is shown on here, but here is just about three miles above. Grieger's place is just about four miles above Woodland, and Woodland is not on this map. It is on a county map which I have here, which I can lay before the jury. It is really a better one to illustrate it, and then I will pick out the elevation on this, to point out; let's have the [140] larger map. (Plaintiffs' exhibit No. 16.) There is Woodland, Washington, Pacific Highway Bridge across the Lewis River at Woodland (indicating).

Well now I have to have that quadrangle sheet to get the elevation; I said that before I began. I will give you the difference in those two elevations. I got to find it on this, because I am not accustomed to reading these little maps frequently. Well, this quadrangle sheet does not show it. I thought it did. I will be prepared to answer Mr. Evans's question in the morning. I will have access to these exhibits between now and 10 o'clock in the morning.

If water is spilled into a pool of water with considerable depth, like the dam or like Lake Merwin,

(Testimony of W. J. Roberts.)

or any pool, it tends to stop the speed; sure, that is true. I noticed a very deep pool in that river immediately below the spillway; that would tend to slow the velocity; I think there are several pools along there. As to whether those would all tend to cut down the velocity,—now, the tendency to change the velocity depends on the relative volume of water going into that pool, and its velocity and the size of the pool; tell me the size of the pool and tell me the volume going down, and I will try and give you a direct answer.

I do not know the difference in elevation in the base of the spillway at the Ariel dam and the line of Grieger's place where the river first gets to it. To figure any velocity of water you have to know the head, the course of the stream, the elevations of the bed of the stream, the width and condition of the banks; there is a lot of difference between the maximum velocity and the mean velocity. As to whether we couldn't tell anything about the mean velocity of a stream flowing, without a cross section, —well, if you had the usual equipment that the water supply department has in this building, we would measure the cross section at intervals of five or ten feet, according to the size of the stream, and drop the little apparatus in there and get the velocity of each particular section and add them all up; integrate [141] them. As to whether an engineer couldn't give an opinion on the velocity of water without that, why, he certainly could. That would be a computed velocity. Every irriga-

(Testimony of W. J. Roberts.)

tion ditch and canal is treated as though you knew something about hydraulics, and that is the slope it has. To compute it you have to know the slope. To estimate the quantity of water flowing you have to know the slope. If you don't know the drop, in other words the slope, you can't figure the velocity. The slope is the difference in the elevations at the two points, divided by the horizontal distance. I have not made any such measurements or computations in this case.

114,000 cubic feet per second equals 228,000 acre feet. I think the testimony yesterday was that for the 24-hour period from midnight of the 21st to midnight of the 22nd, 13,600 acre feet, or a drop of 3.4 feet in the lake occurred in the 24 hours. As I understand the records, I testified that the total acre feet for that day was 228,000, from midnight to midnight of the 22nd, and I testified that the surplus flow for the 22nd was 13,600. As to what percentage of 228,000 acre feet, 13,600 second feet is—it is approximately 16 per cent; I was a teacher of mathematics; I can certainly figure percentage. Whether I am satisfied with the answer of 16,—well, to the nearest unit; I don't go into the decimals. I want to say now that 13,600 is 16 and a fraction per cent of 228,000. 10% of 228,000 is 22,000. 5% is 11,000. 13,600 would be a little over 5%; it looks like that 16% was an error. My usual conveniences are not at hand, and so—if you will bear with me I think I will——; that would be say

(Testimony of W. J. Roberts.)

about 6%. It is a little less than 6. I am just using integers now. It is just a little less than 6.

"Q. All right. Now, Mr. Grieger was asked yesterday about the depth of the water on his place on the 21st. I am asking you this question for illustration. He testified that at one time there was five or six feet of water on his place on the 21st. In inches, if we added 5.96% to it, how much of the six feet of water did we [142] put there in excess."

"A. I didn't put that down, so I would have to put it down on paper—to——"

"Q. If the water is six feet deep on the Grieger place——"

"A. Now, are you going to give it to me in inches? You have to give your figures in the same denominations."

He said six feet; that is 72 inches on Grieger's place. If of that 72 inches we created 5.96 per cent, that is approximately 6%, and I will use the 6 as a multiplier first,—(witness computing) a little over 4 inches; so that if there was 6 feet of water, the average extra throughout that 72 was a trifle over 4 inches.

I am familiar with the Lewis River valley; I have known it since I built that bridge at Woodland 24 years ago. I know the character of the soil and the river just reasonably well. From my observation there, as an engineer, I should say that river has traveled in different channels throughout time.

(Testimony of W. J. Roberts.)

When I was down there we went up on the road in front of Mr. Grieger's house across the river on the Clark County side where his farm is; we came out from that road from Woodland. I was over at his house. I could not say that from there I observed where that river in time has traveled clear across that valley. I looked at the recent actions of the water. It was very apparent that it had eroded a large amount of soil on his farm. I could not say as a fact that on Mr. Grieger's hundred acres, the river has traversed it at different places throughout the years, except that I know the habits of rivers is to do that sort of thing. The character of that soil on Mr. Grieger's farm, he said was silt loam; I know what that is. It is the best bottom land that we have. Silt soil is the finest matter that floats, you might call it, the top in running stream; it is light. That soil got there from the erosion of the land above it. Doubtless it was brought in by flood waters and settled there. I would say that the [143] very land that was washed out was, prior thereto, washed in there by the same process. That type of soil is bound to be subject to erosion. As to whether as soon as you start water across it, some of it is going to move,—well, the erosion comes slightly in a different way. If it is flowing over the top and the top is seeded over, so it does not erode. It has to get an action, undercutting, so it caves off and then washes away. I will say, however, that silty loam is readily subject to erosion, but less so when it has sod growing

(Testimony of W. J. Roberts.)

upon it. It is the cutting element of the water, in the bank, that does it; the water comes along, as it comes up under the bank it cuts in and as it goes over it cuts a little more, and sloughs it off; that is the way it works.

"Q. I think you testified yesterday the greatest erosion is the peak, and when it is at the peak there is the most erosion, because the greater volume of water, the more velocity, so it is bound to happen, the greatest erosion happens when it gets up to the peak?"

"A. When it——

"Q. When it reached the peak and started down, then the erosion will go down accordingly, doesn't it?

"A. Yes, I think that is logical.

"Q. That is true, isn't it?

"A. Yes.

"Q. Now, the cutting elements in the water, is the sediment, the sand and the rocks, and stuff that it carries, that helps with the erosion, doesn't it?

"A. That helps the erosion—the rocks?

"Q. Yes, increases it, doesn't it, the sandier the water is the more stuff of that character, sand, rocks, and gravel going down in the flood, isn't that true?

"A. No, sir, that is not.

"Q. That doesn't have anything to do with it? [144]

"A. I would say not."

(Testimony of W. J. Roberts.)

It is the volume of the water, and the velocity of it, that does the erosion. As to whether the sediment, sand, or rocks, whatever is in the water has nothing to do with the cutting capacity,—there cannot be very much erosion until the river begins to erode——. As to whether drift, timber and logs, and all of that stuff, eroded above there and brought down, would have any influence at all,—well, it would bump into a tree, on the shore, and bump it off and help erode more.

I went up and saw Lake Merwin, the storage reservoir. I am not sure we went clear to the head of the lake. I can't say whether we went up ten miles, a little more or a little less; I saw some drifts. If the dam had not been there, any drift flowing in the river would have flowed down the river until it lodged. I cannot say then to that extent that the dam was a protection to Mr. Grieger's land. As to whether it was not any benefit to him to keep 200 acres of drift away from him,—there is more to the problem than the drift; I would say the dam was not a benefit to him. If this heavy drift was up above, it was evident it was washed up there too, above the lake, certainly; and the water would be very heavy water that washed it away. It is a fact that Lake Merwin in that situation acted as a settling basin and saved a lot of that stuff going down to Mr. Grieger's. That might have been a benefit to him.

I do not know how many second feet the river

(Testimony of W. J. Roberts.)
would have to flow to overflow the bank at the Grieger place; I cannot compute it without more data.

"Q. It is a subject of computation that you could have prepared yourself, couldn't you?

"A. Prepared myself?

"Q. Yes.

"Well, I think—— [145]

"Q. In other words, if Mr. Lord had said to you, 'Mr. Roberts, I want you to go up there and tell me the quantity of second feet flowing there and over my client's farm,' you could have gone up with your instruments and come back and said to him, 'Mr. Lord, that river will overflow at so many second feet,' couldn't you?

"A. Well, it would take considerable study to do it.

"Q. Yes, but you could do it, couldn't you?

"A. Approximately. I don't think you could get down to the inches."

You could get it within a few thousand second feet; and a second foot is two acre feet.

As to what velocity water has to travel to cause erosion in silty loam,—I am going to answer the question all right; the velocity of the water against a bank, to bring down gravel is very fast; but to erode a bank along the river bank, four, five or six, or eight or nine or ten feet per second will do it; I am talking about the river bank. As to what speed

(Testimony of W. J. Roberts.)

it would take to start erosion against the banks anywhere at the Grieger place,—a vertical bank will erode faster than it will on a flat pond that has been filled up with sand, or low ground filled up with sand, or silt as you call it. I went down and went over the Grieger place. I saw that point that comes up in the bend of the river where the wash went through, and back of that, is a low place. I think the land belongs to another party. I understand that there was a jetty in the river there at the Grieger place, and back of that was somewhat of a slope, and some gravel, and the water went across that gravel and from that traveled on to Mr. Grieger's silty loam, and up to the bank on that wooded place. I understand that that was a silty loam soil all across there to the bank. I would say that erosion first started on the edge of the river; on the edge of the old channel; and that would be pretty early in the flood stage. As the water came up the erosion would come up a little farther. I would say that silty loam would start to erode at four or five feet per second. When you speak of velocity it is always in lineal feet per second. [146]

As to whether the wash started when it reached the velocity of four feet per second,—I would say it started a little lower than that, but it is pretty accurate; a little lower than that.

As to whether in my opinion when they started to spill, when the river was flowing 10,000 cubic feet per second, and that got to Grieger's place, the first erosion started around that point some-

(Testimony of W. J. Roberts.)

where,—I would not say that 10,000 feet per second would have done very much damage; I don't think it would have caused any erosion. I don't think 15,000 would start erosion at the Grieger place in the silty loam. As to whether 17,000 cubic feet per second would cause erosion,—not as I saw the channel the day I was up there after the erosion had taken place. I never saw the place before the erosion began.

"Q. All right, you have given your client an opinion now on this, and I have a right to know the basis of it.

"A. All right.

"Q. Would erosion start when the stream is flowing 17,000 cubic feet?

"A. What is the area of the cross section?

"Q. Did you have that when you testified yesterday?

"A. No, sir.

"Q. Then, you made a mere guess yesterday?

"A. At what?

"Q. Telling them when there was erosion.

"A. Well, the visibility of the farm eroded, and washed away.

"Q. So you know that is all you have got to say, you know when water causes erosion because you can see it afterwards, is that true? You as an engineer haven't any idea of what

(Testimony of W. J. Roberts.)

volume of water would be necessary to start erosion?

"A. Well, volume is composed of two elements.

"Q. All right. [147]

"A. The velocity and the cross section of the channel. You talk about cubic feet per second. You have to have a volume, for cubic feet."

I am somewhat familiar with the channel just above the Grieger place just from the observation I made a few days ago. As to how many second feet from my observation and my experience as an engineer, I think that channel will carry just above the Grieger place where there is no wash, just where it enters back of his line, where the big wash started over there, I would say that the capacity of that in second feet would be something under a hundred thousand. When you get up to something under a hundred thousand, and it gets on to the bank, erosion would start. A hundred thousand at the jetty would go over Mr. Grieger's place, and erosion would start when it went over. I think erosion would start long before you got to a hundred thousand. I don't think erosion would start when spillage was around thirty thousand cubic feet per second; I think it might start at fifty; there are many conditions. That river is not a straight channel like an irrigation canal, and bending at right angles, an ox-bow and horse-shoe bend.

(Testimony of W. J. Roberts.)

"Q. Yes, with your experience as an engineer with that condition there, that straight chute of water, and a turn then where the jetty, and the high bank and all on one side, and the low place on the other where the swale went through.

"A. Yes, sir.

"Q. Isn't it your opinion that erosion would start at least by 50,000 second feet?

"A. How much?

"Q. 50,000 second feet?

"A. Yes, sir, I think it would start somewhere there.

"Q. As you go from fifty thousand up to fifty-five, sixty, sixty-five, seventy, seventy-five and eighty, erosion will increase with the depth of the water, because of the weight, wouldn't it?

"A. Increase with the depth of water? It would increase with the velocity of the water. [148]

"Q. It is the depth that makes the velocity. The weight is what makes velocity?

"A. The velocity?

"Q. Yes.

"A. The slope of the channel and nothing else.

"Q. And nothing else?

"A. And nothing else.

"Q. Erosion, however, increases with quantity of water on that slope, doesn't it?

(Testimony of W. J. Roberts.)

"A. Yes, sir, the higher the channel the higher the velocity.

"Q. The greater the discharge, the greater the erosion?

"A. Yes, sir.

"Q. I think we understand each other. As we progressively approach from fifty thousand upwards, there was an erosion all the way?

"A. I would say especially in the tortuous bend.

"Q. And this was a tortuous bend where this went through?

"A. Yes, sir, plenty of it.

"Q. Very subject to erosion, wasn't it?

"A. Yes sir."

I heard Mr. Calkins, the government expert, testify; most of it. I heard him testify that the peak of the flood was around midnight of the 21st, or just after midnight on the 22nd, was 129,000 cubic feet per second.

"Q. Now, let me get this, the gates were opened gradually until we got to the last gate, and it was a few feet closed, a few feet—partially closed—a few feet partially opened and a few feet of it was closed. We opened that so we finally succeeded in having all the gates open at 12:16.

"A. At 12:16 after midnight?

"Q. Yes.

(Testimony of W. J. Roberts.)

"A. On the 22nd. [149]

"Q. Now, if that happened to be also the peak of the flood, then the water was the highest then that it could get, wasn't it?

"A. Very likely.

"Q. So that your discharge at that time, with all of the gates open, right then would be the greatest discharge on the lake, wouldn't it, of any time?

"A. Yes, sir.

"Q. So that it was the accumulation of water in the dam on the 21st—on the 20th?

"A. 22nd.

"Q. On the 21st, the peak was at midnight, the 21st?

"A. Yes, just before the 22nd.

"Q. So that when we opened the gates at midnight or sixteen minutes after, the water that caused that peak was the water in the lake at that time, wasn't it?

"A. Yes, sir.

"Q. So that from then on any surplus spillage was water which came into the reservoir after twelve o'clock midnight, wasn't it?

"A. It looks that way.

"Q. Well, that is correct, isn't it?

"A. I think so."

Re-direct Examination by Mr. Anderson

I would say that the raising of the water to the elevation of 237 feet back of the dam, and allowing it to drop between three and four feet in elevation

(Testimony of W. J. Roberts.)

in a period of twenty-four hours, would have some effect on Mr. Grieger's land. I never measured the channel below the dam; I never had occasion to survey it, either for depth or for width. I don't know the sectional area of that channel. As to whether I would be able to testify with any degree of accuracy at all without having possession of those figures, as to how much water it would take to overflow the banks, or to wash away Mr. Grieger's land, —you couldn't do it without some computation that covered the question [150] you asked; in fact, I wouldn't know anything about it all without those figures.

As to the effect upon the plaintiff's land of discharging water at the peak at the rate of 129,000 cubic feet per second,—when the gates are opened you are piling more water on top of the flood peak through these sluice gates operated by the managers of the dam, the power company.

Re-cross Examination by Mr. Evans

I think 129,000 was the flood peak. 129,000 cubic feet per second is the gauging made by estimation of the United States Geological Department, their office being in this building, and that was the flow at the Ariel dam, at the gauging station, I should say. That is what they call the flow that went down the river, the Ariel gauging station, and that is the peak that did go down. If I said that was added to some flood condition, I would like to correct myself; I think I want that answer to stand.

Plaintiffs rest.

(Thereupon the following proceedings were had:)

(MOTION FOR NON-SUIT)

THEREUPON, plaintiffs having rested, the defendant moved the court for a judgment of non-suit upon the following grounds, severally:

First, a total failure of proof of actionable negligence.

Second, that the evidence conclusively shows that there was unprecedented flood which caused the damage to the plaintiffs' property, regardless of any conduct of the defendant.

Third, that the evidence affirmatively shows the exercise of reasonable care by the defendant.

Fourth, that any verdict permitted to be returned to the court by the jury on the evidence as it now stands would be purely speculative and [151] without basis for computation.

THEREUPON defendant's said MOTION FOR NON-SUIT was by the Court DENIED.

To which ruling of the Court denying defendant's motion for a non-suit, an EXCEPTION WAS DULY TAKEN AND ALLOWED.

THEREUPON, without offering any testimony, the DEFENDANT RESTS.

THEREUPON, by agreement of counsel, plaintiff's Exhibit No. 10, a chart or graph was admitted in evidence and marked plaintiffs' Exhibit No. 10.

(Transcript of testimony, 426; said Exhibit 10 being identical with Exhibits 11 and 12 (Transcript of testimony, 418))

THEREUPON, by agreement of Counsel, Plaintiffs' Exhibit No. 15, a map of the Lewis River region was admitted in evidence and marked Plaintiffs' Exhibit No. 15.

ELLIS & EVANS
JOHN A. LAING and HENRY S. GRAY
Attorneys for Defendant.

[Endorsed]: Lodged Jan. 18, 1936. [152]

United States of America
Western District of Washington—ss.

The foregoing bill of exceptions having been lodged by the defendant with the Clerk of the above entitled court on the 18th day of January, 1936, and duly presented to the undersigned Judge for certification on the 27th day of January, 1936, together with the plaintiff's written waiver of any and all objections to said bill and of any and all notice of the time of settlement thereof, filed Feb. 8th, 1936.

IT IS NOW AND HEREBY CERTIFIED That the foregoing, appearing on pages 1 to 111, inclusive, together with the following described Exhibits: 1 to 10, inclusive, and 13 to 19, inclusive, and A-1 and A-2, referred to therein, which original Exhibits have been ordered forwarded by the Clerk of the District Court of the Western District of Washington to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, is a statement of all material evidence admitted and all material proceedings, rulings and exceptions taking place upon the trial. The instructions of the Court are not included, but in view of the present assignments of

error, the instructions are not considered upon the present record material.

Accordingly, said bill of exceptions is hereby approved, allowed and settled and made a part of the record herein.

Given under the hand of the Judge of said Court before whom said proceedings were had, this 8th day of February, 1936.

EDWARD E. CUSHMAN
United States District Judge

[Endorsed]: Filed Feb. 8, 1936. [153]

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[Title of Court and Cause.]

## STIPULATION FOR TRANSCRIPT OF RECORD ON APPEAL.

IT IS HEREBY STIPULATED by and between the respective parties to the above entitled action, by their undersigned attorneys of record herein, that the transcript of the record on appeal to be prepared by the Clerk of the above entitled court and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, shall consist of the following papers and documents on file in the office of the Clerk of the above entitled Court:

1. Plaintiffs' second amended complaint.
2. Defendants' answer to second amended complaint.
3. Plaintiffs' reply to said answer.

4. Verdict of the jury.

5. Petition for new trial filed October 19, 1935.

6. Minute order entered November 23, 1935, denying motion or petition for new trial.

7. Judgment.

8. Stipulation for extension of time for settlement of bill of exceptions, dated October 11, 1935 and filed October 15, 1935.

9. Order extending time for preparation and service of bill of exceptions, filed October 15, 1935.

10. Stipulation for extension of time for preparation and settlement of bill of exceptions and for extension of term of court, dated December 19, 1935 and filed December 23, 1935. [154]

11. Order extending time for preparation and service of bill of exceptions to February 4, 1936, filed December 23, 1935.

12. Petition for order allowing appeal.

13. Assignment of errors on appeal.

14. Order allowing appeal.

15. Bond on appeal and supersedeas, with court's approval thereon endorsed.

16. Citation on appeal, with admission of service thereon.

17. Stipulation for extension of term dated January 24, 1936, filed January 27, 1936.

18. Stipulation for transmission of original exhibits, dated January 29, 1936 and filed February 1, 1936.

19. Order for transmission of original exhibits, filed February 1, 1936.

20. Motion for extension of term, filed February 4, 1936.

21. Order extending term for thirty days, filed February 4, 1936.

22. Waiver of objections to bill of exceptions and consent to settlement thereof, dated February 6, 1936.

23. Bill of exceptions.

24. This stipulation.

25. Praecipe for transcript of record to which this stipulation is attached.

Dated this 6th day of February, 1936.

WM. P. LORD
BEN ANDERSON
Attorneys for Plaintiffs.
ELLIS & EVANS
HENRY S. GRAY
Attorneys for Defendant.

[Endorsed]: Filed Febr. 8, 1936. [155]

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[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the Above Entitled Court:

You are hereby requested to prepare, certify and file in the United *States* Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, a transcript of

record on appeal and to include in such transcript of record the several documents filed in your office in the above entitled cause which are listed in the stipulation attached hereto and filed herewith.

Said transcript of record shall be prepared and certified as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and together with the original exhibits, to-wit: Plaintiff's Exhibits numbers 1 to 10, inclusive, and 13 to 19, inclusive, and defendants' Exhibits A-1 and A-2, be filed in the office of the Clerk of the Circuit Court of Appeals for the Ninth Circuit, in San Francisco, California.

Dated this 6th day of February, 1936.

ELLIS & EVANS
HENRY S. GRAY
Attorneys for Defendant.

[Service].

[Endorsed]: Filed Feb. 8, 1936. [156]

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[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss.

I, Edgar M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing typewritten transcript of record consisting of

pages numbered from one to 156, inclusive, is a full true and correct copy of so much of the record, papers and proceedings in the case of Fay M. Grieger and Lois Grieger, Plaintiff and Appellee vs. Inland Power and Light Company, a corporation, Defendant and appellant, cause No. 8352, in said court, as required by praecipe of counsel filed and of record in my office in said District at Tacoma, and that the same constitutes the record on appeal from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I herewith attach and transmit the original citation in this cause, with acceptance of service thereon.

I further certify, that under separate cover I am forwarding to said Circuit Court of Appeals, the original exhibits, called for in stipulation and order for transmission of original exhibits, as filed in said cause and shown herein.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred and paid by and on behalf of the appellant herein for making of the appeal record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

| | |
|---|---|
| Appeal fee | $ 5.00 |
| Clerk's fee (Act Feb. 11, 1925) for making record 435 folios @ 15c | 65.25 |
| Clerk's certificate to this record | .50 |

Clerk's certificate to exhibits..... .50

Total .....$71.25

I further certify that the cost of preparing the record on appeal amounting to $71.25 has been paid to me by the appellant.

IN TESTIMONY WHEREOF, I have hereunto affixed the seal of said Court, at the City of Tacoma, Washington, this 15 day of February, 1936.

EDGAR M. LAKIN, Clerk,
By E. W. PETTIT, Deputy. [157]

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[Title of Court and Cause.]

CITATION ON APPEAL.

UNITED STATES OF AMERICA:

To Fay M. Grieger and Mary Lois Grieger, Greeting:

You are hereby notified that in a certain action in the District Court of the United States for the Western District of Washington, Southern Division, wherein Fay M. Grieger and Mary Lois Grieger are plaintiffs and Inland Power & Light Company, a corporation, is defendant, an appeal has been allowed the defendant to the Circuit Court of Appeals for the Ninth Judicial Circuit, and YOU ARE HEREBY CITED AND ADMONISHED to be and appear in said Circuit Court of Appeals in the City of San Francisco, State of California, within thirty (30) days from and after the date of the signing of this citation, to show cause, if any there be, why the judgment appealed from should

not be corrected and speedy justice be done to the parties in that behalf.

WITNESS the Honorable Edward E. Cushman, Judge of the United States District Court for the Western District of Washington, Southern Division, this 20th day of January, 1936.

EDWARD E. CUSHMAN
United States District Judge.

[Service.]

[Endorsed]: Lodged Jan. 20, 1936. [158]

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In the Circuit Court of Appeals of the United States for the Ninth Circuit

No. 8130

FAY M. GRIEGER and MARY LOIS GRIEGER,
Plaintiffs and Appellees,

vs.

INLAND POWER & LIGHT COMPANY,
a corporation,
Defendant and Appellant.

STIPULATION RE PRINTING OF RECORD

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled cause, through their respective counsel, that in the printing of the record under the supervision of the clerk of the above entitled court, there may be omitted all titles, captions, jurats and verifications.

IT IS FURTHER STIPULATED that as to all exhibits admitted in evidence on the trial of said cause in the lower court, and which by order of the Judge of the lower court were ordered transmitted by the clerk of said court to the clerk of the above entitled court, the clerk of said Circuit Court of Appeals may cause to be reproduced and incorporated in the transcript to be printed by him such of said exhibits as he may find are susceptible of being reproduced in said printed transcript, but that all of said exhibits in said cause, whether or not reproduced in said printed record, may be referred to in briefs or argument and may be considered by the court on said appeal with like effect as though reproduced and contained in said printed record.

Dated this 25th day of February, 1936.

WM. P. LORD
BEN ANDERSON
Attorneys for Plaintiffs-Appellees
LAING & GRAY
JOHN A. LAING
HENRY S. GRAY
Attorneys for Defendant-Appellant

ORDERED that original exhibits need not be printed or reproduced in printed transcript.

CURTIS D. WILBUR
Senior U. S. Circuit Judge.

[Endorsed]: Filed Feb. 27, 1936. Paul P. O'Brien, Clerk.

[Endorsed]: No. 8130. United States Circuit Court of Appeals for the Ninth Circuit. Inland Power and Light Company, a corporation, Appellant, vs. Fay M. Grieger and Mary Lois Grieger, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed February 17, 1936.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8130

# United States
# Circuit Court of Appeals
## For the Ninth Circuit.

INLAND POWER AND LIGHT COMPANY,
a corporation,

Appellant,

vs.

FAY M. GRIEGER and MARY LOIS GRIEGER,

Appellees.

# Brief of Appellant

**Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.**

ELLIS & EVANS,
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Robert E. Evans,
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LAING & GRAY,
John A. Laing,
Henry S. Gray,
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Attorneys for Appellant.



SWEENEY, STRAUB & DIMM, PRINTERS, PORTLAND, ORE.

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No. 8130

# United States
# Circuit Court of Appeals
## For the Ninth Circuit.

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INLAND POWER AND LIGHT COMPANY,
a corporation,

Appellant,

vs.

FAY M. GRIEGER and MARY LOIS GRIEGER,

Appellees.

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# Brief of Appellant

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**Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.**

SWEENEY, STRAUB & DIMM, PRINTERS, PORTLAND, ORE.

## STATEMENT OF THE CASE

This action was brought by appellees (plaintiffs below) to recover from appellant (defendant below) damages in the sum of $15,150.00, alleged to have been sustained to their property from flood waters which they allege were negligently released by appellant through the flood gates of appellant's dam on the Lewis River on or about December 21st and 22nd, 1933, appellees claiming that appellant augmented the natural flow of the stream to their pecuniary damage in that amount. (Complaint; Tr. 2 to 10).

The cause was tried to a jury, and at the close of appellees' case in chief, appellant moved for a nonsuit (Tr. 198), which was denied. An exception to the ruling denying a nonsuit was duly taken and allowed (Tr. 198). Appellant thereupon stood upon its motion for a nonsuit, offered no testimony, and rested its case. (Tr. 198). The Court then instructed the jury, which returned a verdict for appellees in the sum of $4,000.00 (Tr. 20), and judgment on the verdict was entered. (Tr. 24-25). This appeal is from that judgment.

Appellant took no exceptions to the Court's instructions, and the trial judge, in settling the bill of exceptions, certified that "in view of the present assignments of error, the instructions are not considered upon the present record material". (Tr. 199-200). Appellant's petition for a new trial (Tr. 20-23) was denied, and an exception to the ruling was allowed. (Tr. 23).

The principal grounds of the motion for a nonsuit, as well as of the petition for a new trial, were the total

failure of proof of actionable negligence, the insufficiency of the evidence to support the verdict or any verdict in favor of appellees, and that any verdict rendered in their favor on the evidence would be and was wholly speculative and conjectural. Such a challenge to the sufficiency of the evidence has made it necessary for appellant to bring up for review, in narrative form, the entire testimony. (Tr. 40-197).

As the exhibits consisted solely of photographs, maps and graphs it was stipulated by the parties, and ordered by the trial judge, that all such original exhibits be forwarded to the clerk of this court (Tr. 36-37), and, in conformity with such order, their reproduction or printing in the printed transcript of record was dispensed with by order of the Senior Judge of this court. (Tr. 207).

At the time this controversy arose, appellant owned and operated an hydroelectric plant on the Lewis River, located at Ariel, approximately twelve miles north and east of Woodland, Washington. (Compl., Par. I; Tr. 2).

The Lewis River forms the boundary between Clark and Cowlitz counties. (Tr. 162). The river drains an area of about 750 square miles above Ariel, including some mountain peaks. It gets about one-sixth of the ice cap of Mount Adams, and about half of that of St. Helens. (Tr. 149). A map of the Lewis River drainage area was admitted in evidence as appellees' Exhibit 16. (Tr. 150).

The main structural features of appellant's hydroelectric project at Ariel consist of a high arch-type con-

crete dam, equipped with five flood gates of radial type (Tr. 178) that operate like a quadrant working on a hinge (Tr. 85), and a power house with appurtenant facilities. The flood gates are normally operated electrically and, when wholly or partially raised, create the spillway through which the waters of the river are discharged or spilled upon a concrete apron, from which they flow on down the river channel in a westerly direction toward and through the Town of Woodland. (Tr. 46). The dam creates a lake or reservoir covering approximately 4000 acres at the maximum, and approximately 3900 acres at elevation 235. (Tr. 145). On the south or Clark County side of the river, near the base of the dam, is located the power house, which secures the water for its operation through a pipe or penstock, some fifteen feet in diameter, which extends through the dam and draws its supply from the reservoir, sometimes referred to in the record as "Lake Merwin". The center of this penstock is at elevation 60 feet. (Tr. 43). The bottom of the lake at the dam is elevation 50. (Tr. 84). The generating capacity of the power plant is approximately 45,000 kilowatts (Tr. 79), and when operated at full load the carrying capacity of the penstock is something over 3000 second feet of water. (Tr. 78). An excellent reproduction of the main structural features is shown in a photograph of the project, in evidence as Appellees' Exhibit 8. (Tr. 79).

The five flood gates are a part of and extend laterally across the face of the dam. The smallest gate, or the so-called "control gate", is the most northerly one, on the Cowlitz County side, and is 10 feet wide and 32½ feet

high. This small control gate is used for most of the operations. It is the one seen on the extreme left of the spillway when facing the photograph, Exhibit 8. (Tr. 90). The operation of this gate is normally controlled from the power house (Tr. 78), and under normal operating conditions the operators in the power house, by raising or lowering this control gate, are enabled to maintain the water level in the reservoir at any desired elevation. The normal operating level is at elevation 235. (Tr. 135). Each of the other four gates is 39 feet wide and approximately 32½ feet high. (Compl. Par. IV; Tr. 4). Each of the four large gates will spill approximately 30,000 second feet, and the small control gate about 7,000 second feet, when the elevation of the water level of the reservoir is 237. (Tr. 79). The gates are used to maintain the water in the reservoir at the desired level. (Tr. 89). After the winter storage has been secured, the water is maintained at approximately elevation 235 by operating the gates as required. As a gate is raised the water falls from the bottom of the gate. (Tr. 178).

While the complaint refers to the dam as being constructed "to a height of approximately 240 feet", and to the gates as enabling the water in the reservoir to be "lowered to approximately 205 feet" (Compl. IV, Tr. 3-4), the testimony shows that these figures refer to elevations above mean sea level (Tr. 178; 85), which is the datum plane. (Tr. 89).

The project is under the jurisdiction of the Federal Power Commission (Tr. 98) which requires records to be kept of the elevation of the water in the reservoir and of the flow of the river at the Ariel dam. (Tr. 90-91

and 98). The original records furnishing such data are submitted in the form required by the Federal Power Commission, and are the property of that Commission, but are kept in the office of the United States Bureau of Geological Survey at Tacoma. (Tr. 90). Such original records are considered so thoroughly accurate that they are prepared for publication on a daily basis (Tr. 96), they are published in the government's water supply papers (Tr. 98), and are accepted as the authentic official records of reservoir elevations and stream flows at the Ariel dam. (Tr. 107). Such records, when considered with the known size of the gates and the extent to which they are open at any given time, enable the government's representatives, or any other competent person, to compute with reasonable accuracy the discharge of water in second feet at any given time. (Tr. 107).

The recording station at Ariel is located on the dam, and the continuous record of the elevation or water level of the reservoir is produced and recorded mechanically and automatically by means of a pencil operated by a clock. A sheet of paper is passed around a cylinder which operates just beneath the pencil. If the cylinder is not rotated, the pencil during the week will make a straight line across the chart or paper. The cylinder has a wheel on one end over which passes a tape, and on the other end of the tape, and connected to it in the stilling well in the reservoir, is a float. As the water level rises or falls in the reservoir and in the stilling well, the tape in passing over the wheel turns the wheel and correspondingly turns the cylinder, thus causing the pencil to record on the chart or paper the variations in the eleva-

tion of the surface of the reservoir. Each sheet of paper records one week's operations. The chart or paper is graduated into vertical and horizontal lines, with the result that the rise or fall of the float in feet is translated into the graduated scale on the chart or paper, so that, regardless of what the elevation of the reservoir may be at the time, the pencil makes a corresponding mark on the chart or graph. (Tr. 91). The chart or graph traced from 8:00 A. M. of Saturday, December 16 to 8:00 A. M. of Saturday, December 23, 1933, includes the days of interest in this action and is in evidence as Appellees' Exhibit 13. The horizontal lines on Exhibit 13, with numbers indicated on each side of the chart, represent elevation in feet above mean sea level, each such horizontal line representing a difference in elevation of one-half of one foot, and the heavier horizontal lines, with the marginal figures opposite them, representing a difference in elevation of five feet, each such five feet being subdivided into ten half-foot spacings represented by the less prominent lines. Similarly, the chart (Exhibit 13) is spaced into seven twenty-four hour periods, starting and ending with midnight of two Saturdays. Each such twenty-four hour period is divided by heavy vertical lines marking off eight-hour intervals, which are in turn subdivided by lighter vertical lines, the space between each two such lighter vertical lines representing a two-hour interval. Consequently, Exhibit 13 shows the elevation of the surface of the reservoir at any given hour of day or night between 8:00 A. M. of Saturday, December 16, and 8:00 A. M. of Saturday, December 23,

1933, and the information so shown, when considered in connection with the known openings of the gates at the corresponding time, enables reasonably accurate computation in second feet of the discharge of water through the spillway at such particular time. (Tr. 107).

Records of the natural stream flow of Lewis River were originally made by the government at a gauging station at Amboy, a station located within the area later absorbed by the creation of the reservoir. The records of that station cover the period from February, 1911, to April, 1931. (Tr. 101). Since the Ariel project was placed in operation in 1931 (Tr. 41) the recording station which shows the height of the water in the lake has been maintained at the dam. This record is used in conjunction with a gauging station located downstream from the dam which was installed several years prior to April, 1931. (Tr. 104). The records from the water surface recording station at the dam and the gauging station below the dam are used by the United States Bureau of Geological Survey for the purpose of determining the natural stream flow of the Lewis River at Ariel. (Tr. 107).

Prior to the flood of December, 1933, the greatest natural stream flow of Lewis River during the period of the government's record beginning in February, 1911, was 60,000 second feet at the Amboy station. That was just an *instantaneous* peak, and was reached on December 18, 1917. (Tr. 102-103).

The site of the Ariel hydroelectric project was first located in 1921, and the consulting engineer who made or directed all of the investigations of Lewis River, prior

to actual construction of the project beginning in 1929 (Tr. 144), made extensive investigations of the watershed and of the river, devoting half of his time to that work during the eight years between 1921 and 1929. Such investigations included establishing recording stations on the river, examination of the history of the river as to past floods and freshets for the purpose of determining its historical flood peak (Tr. 146-147), interviewing old settlers in the valley, and examining log drifts along the river, and high water marks (Tr. 147-148), from all of which, including an office record of all floods on the river since the 60's, the instantaneous peak of 60,000 second feet at Amboy in December, 1917, was found to be the historical peak in the modern history of the river. (Tr. 149). The flow of the river at Ariel is roughly ten per cent greater than that at Amboy. (Tr. 147). As the result of such investigations the estimated maximum flow ever to be expected at Ariel was determined to be 66,000 second feet, but in constructing the plant the gates were designed to carry 130,000 second feet, as it is common practice among engineers to provide spillways of double the capacity of the highest flood known. (Tr. 147). In designing the plant it was not considered probable that the power house might ever be flooded out. (Tr. 146).

For many days prior to the 21st day of December, 1933, there had been "great and unusual" rainfall in the watershed of the Lewis River. (Compl. Par. V; Tr. 5; also Tr. 58). The weather was very warm for that time of year, and was warm enough to melt snow on the high places. (Tr. 157).

The river reached such height during the week beginning December 17, 1933, that on the morning of the 20th the water was close to the level of the Pacific Highway at Woodland. (Tr. 60).

On the evening of December 20, 1933, the water of the river was up very close to the fire hall in Woodland, and the fire apparatus was being removed from the building. (Tr. 130). The people were panicky, and expecting higher water. The operators of the dam kept in constant telephone communication with the people at Woodland. (Tr. 131). It was then raining very hard, and that condition continued through December 21st and part of the 22nd. (Tr. 131).

One of appellees' witnesses (Carl E. Insull) owned a 47½ acre farm on the bank of the Lewis River near Woodland. (Tr. 57; 61). At 5:00 P. M. on Wednesday, December 20th, he set a three-foot cedar stick in front of his house to mark the rise of the water. (Tr. 60). At that time the current was very strong. (Tr. 61). At 4:00 o'clock in the morning of Thursday, the 21st, the water had risen over the three-foot stick, over his fences, and was around his house so that he could not get out. (Tr. 61-62). At that time the discharge at Ariel was 76,000 second feet (sheet for December 21 of Ex. A-2), and the water in the reservoir was rising. (Ex. 13). By that time the current in the river was "terrible". (Tr. 62). The river was still higher that evening, and reached its peak at this man's farm between 12:00 and 1:00 o'clock on Friday morning, December 22nd. The river started to recede from that time on. (Tr. 62).

At the State Fish Hatchery, located on the river

about four miles downstream from the Ariel dam, the roadway running along the bank of the river was under six or seven feet of water at half past seven on the morning of December 21st. The river was cutting into its banks, and a house on the lower ground next to the road in the vicinity of the fish hatchery floated away and was carried downstream. Cottonwood trees were washed out by the river that same day. (Tr. 150-152).

At 8:15 in the evening of December 21st the river was out of its banks and so deep over the Pacific Highway at Woodland that one of appellees' witnesses stalled his automobile in trying to get through it, and had to push his car to higher ground. (Tr. 54-55). The water was then high enough to get into the motor of his car. (Tr. 56). At 5 o'clock on the afternoon of December 21st, the lower part of Woodland was flooded, and shortly before 8 o'clock that evening the town was pretty generally flooded. (Tr. 56).

Following many days of heavy rain, it rained an additional 3½ inches at Ariel on the 21st. (Tr. 87). The stream continued to rise, and by 10 o'clock P. M. on December 21st the small flood gate and three of the four large gates were wide open, the fifth or last large gate was up 9 feet, 105,000 second feet was then being discharged through the spillway (Tr. 129), and the water in the reservoir was still rising. (See Exhibit 13). At 10:55 P. M. that evening the water was still rising. (Exhibit 13). At that time water began to enter the power house, and a little before midnight orders were given to complete the opening of the last gate (No. 5), which at that time was already open between 9 and 13

feet (Tr. 133), and to shut off the power. At that time telephone communication had been lost, the operators in the power house were wading in a foot of water and, when they were leaving the power house to cross the swinging footbridge leading to the other side of the river, the water current on the transformer platform of the power house was so strong that two of the seven men were washed off their feet. (Tr. 132-134).

Following the completion of the opening of gate No. 5 all operations were conducted on top of the dam, where the gates are located. (Tr. 133; 142).

After the opening of gate No. 5 had been completed at 12:16 A. M. on December 22 (Tr. 86), all five gates remained open until 2:00 P. M. of that day. The opening of gate No. 5 was then reduced from 26½ feet to 20 feet, at which time the spill was 112,600 second feet. (Tr. 142).

All gates then remained in the same positions, and the spill of 112,600 second feet continued to 8:30 P. M. of the 22nd. The opening of gate No. 5 was then reduced from 20 feet to 14 feet, and the spill was thereby reduced to 101,000 second feet. (Tr. 142-143). At 11:00 P. M. of December 22 the opening of gate No. 5 was reduced from 14½ feet to 8½ feet and the spill was then 92,700 second feet. (Tr. 143).

Regardless of whether electric power was available, all or any of the gates could have been closed at any time, as each gate is equipped with a magnetic hand brake, with a spring tension which may be released by hand. (Tr. 86; also Tr. 124-125). On the cross-examination of appellees' witness, David J. Shore, a photograph of

such hand brake was admitted in evidence as appellant's Exhibit A-1. (Tr. 125).

At no time during this flood period were all the gates opened or all the gates closed in one operation, nor was even one of the large gates ever completely opened or completely closed in one movement or operation. They were opened gradually, as the rain and flood increased. (Tr. 50). The largest single change of position of one of the large gates was the final operation, begun just before midnight on the night of December 21st, at which time gates Nos. 1, 2, 3 and 4 were already wide open, gate No. 5 was already open from 9 to 13 feet (Tr. 133), and was then opened the remainder of its full capacity of 26½ feet, such opening being completed at 12:16 A. M. on December 22nd.

When the Court in reading the record observes references to the opening or closing of the gates, it should always be borne in mind that the witness is referring to the *partial* opening or *partial* closing of a single gate, as gate operation was never conducted in any other way, subject, of course, to the shifting of the total discharge of the small gate over to one of the large gates for the purpose of facilitating control of the lake elevation. (Tr. 78).

On the cross-examination of the witness David J. Shore, there were admitted in evidence, as appellant's Exhibit A-2, the original log sheets cut from the log book of appellant's power house operations. (Tr. 125). These log sheets cover the period from December 2 to December 21, both dates inclusive. Each page represents one calendar day's operations, from midnight to

midnight, except that, following the enforced abandonment of the power house, notes of the operations were taken on top of the dam (Tr. 141-142) and original entries were not made in the log book for December 21st after 11:00 P. M., or on the 22nd.

The Federal Power Commission requires that records be kept for the purpose of determining the flow or discharge at the Ariel dam (Tr. 98), and the data from the original log sheets were furnished by appellant to the United States Bureau of Geological Survey at Tacoma. (Tr. 104). Such data were accepted by the federal government as accurate. (Tr. 96). The information disclosed by this original log record as to gate openings at a particular time, coupled with the information disclosed by the graph showing the water elevation in the lake at the corresponding time (Exhibit 13), enables computation to be made of the quantity of water being discharged at such time. (Tr. 101; 107).

For the convenience of the Court there has been added as an appendix to this brief (See Table I) a reproduction, in tabular form, of (1) information disclosed by Exhibit 13 as to the water elevations of the reservoir for certain hours from 8:00 A. M. of December 16 to 8:00 A. M. of December 23, 1933; (2) all of the data supplied by the log sheets (Exhibit A-2) as to gate positions for the period from December 2 to 11:00 P. M. on December 21, both inclusive, supplemented by data reproduced from the testimony, which furnishes similar information as to gate positions on December 1st, and also on December 21st after 11:00 P. M., as well as through December 22nd and to 1:00

A. M. on December 23rd; and (3) the spill or discharge of water through the gates during that entire period. (Note: Where references are found in the transcript to appellees' Exhibit 11 or Exhibit 12, it should be remembered that those two exhibits are identical with appellees' said Exhibit 10. (Tr. 198)).

In addition to the recording station maintained at the Ariel dam, a gauging station was concurrently maintained by the United States Bureau of Geological Survey downstream from the dam for the purpose of determining the *mean daily discharge* of the river at Ariel, pursuant to requirements of the Federal Power Commission. (Tr. 98). At that station the water surface elevation and corresponding time are recorded on a chart or graph, automatically and mechanically, similarly to the method followed at the dam. (Tr. 96). The discharge at that gauging station is normally computed by the use of a chart or graph (appellees' Exhibit 14), which shows the relation between the discharge and the elevation of the river at that gauging station (Tr. 97-98), and which is used in conjunction with a mechanical integrator, which is an instrument placed along in the graph, thus enabling the mean discharge for a 24-hour period to be readily determined. (Tr. 99-100). The flood of December, 1933, submerged, by several feet, the recording mechanism at that gauging station, with the result that the chart or paper record made at that station was reduced to pulp, and the record of that station for the week beginning with December 18th was thus destroyed. (Tr. 100). The mean daily discharge records at that downstream station, shown on Exhibit 10, for the several

days that its recording mechanism was out of commission, were therefore determined from the gate openings at the dam (Tr. 104), considered in connection with the known discharge of each gate under a certain elevation of water. (Tr. 101). For that reason the daily mean discharges shown on Exhibit 10 carry in front of them for those days the abbreviation "Est.", for "estimated", in lieu of their determination in the customary manner by the use of the chart, Exhibit 14, and the mechanical integrator.

Exhibit 10 also shows, in its upper left-hand corner, that the peak discharge at Ariel was 129,000 second feet. This occurred sometime in the early morning hours of December 22nd. (Tr. 97; Ex. A-2; Appendix, Table I, page IV).

The mean daily flow at Ariel on December 21 was 84,000 second feet, and was 114,000 second feet on December 22nd. (Exhibit 10). Appellees' Exhibit 9 shows the mean or average daily elevation of the water in the lake. (Tr. 92). For convenient reference there has also been added as an appendix to this brief (see Table II) a tabulation showing the mean daily elevations of the water in the lake, taken from Exhibit 9, and the mean daily discharge of water for the corresponding day, expressed in second feet, taken from Exhibit 10, uniformly computed for each 24-hour period from midnight to midnight.

The "mean daily discharge" is found by adding the hourly discharges during such period from midnight to midnight, and dividing by 24. (Tr. 99). The distinction between the "peak" and the "mean" is that the mean is

an average of all the water flowing during the day, but within such day, with a mean of 114,000 second feet, there might be a minimum flow of 100,000 second feet and a peak flow of 129,000 second feet. (Tr. 97). Unless the flow were uniform throughout the day, the mean presupposes some flow higher, and some flow lower, than the mean. (Tr. 101). The maximum is of course always much greater than the mean. (Tr. 177).

The peak elevation of the water in the lake, 237.6 feet, was reached at midnight on December 21st, or possibly a few minutes before. (Ex. 13; Tr. 93). Following the completion of the opening of gate No. 5 to the extent of its then remaining capacity, and during the ensuing 24-hour period from midnight of December 21st to midnight of December 22nd, the elevation of the water in the lake was lowered from 237.6 feet to elevation 233.6 feet. During that 24-hour period the quantity of water discharged in excess of the then natural flow of the river was calculated by appellees' engineer to be 13,600 acre feet (Tr. 177), which was the equivalent of a continuous flow of 6,800 second feet (Tr. 177), an amount slightly less than that which can be discharged by the small control gate, with the lake elevation 237 (Tr. 79), and which represented a little less than 6 per cent of the natural stream flow during that 24-hour period. (Tr. 185-186).

A cubic foot per second, or "second foot" as it is commonly called, is a cubic foot of water passing a given point in one second of time. The term "acre foot" means a volume of water equal to one acre in area and one foot

in depth. The terms "second foot" and "acre foot" are both measurements of quantity. (Tr. 95).

Following the flood of December, 1933, appellees brought this action, alleging in their second amended complaint (Tr. 2-10) that in the construction of its hydroelectric plant, in the storage of water in the reservoir, and in the operation of the flood gates during the flood of December, 1933, appellant was negligent, and that such negligence was the proximate cause of the damage to the plaintiffs' property, located some seven or eight miles downstream from the dam. The allegations of negligence, in more detail, were in substance:

> (a) That the power plant was carelessly and negligently erected immediately below the base of the dam, and so situated that if the waters rose in the lake above the level of approximately 240 feet by the gauge, the waters would be discharged over the top of the dam into and upon the power plant, and would inflict great damage upon it so that it was impracticable for the defendant to maintain the dam with the gates closed and thereby permit the waters to accumulate in the lake and ultimately pass over the top "into said dam".
>
> (b) That the chute or apron below the dam was constructed with bulkheads at the sides forming a chute, and so designed as to direct into the current of the river the water released through the flood gates, and thereby to increase not only the quantity but the force and violence of the water released through the flood gates.
>
> (c) That, notwithstanding the said heavy rainfall, appellant carelessly and negligently permitted

the waters of the reservoir to rise and remain at and above a gauge level of 235 feet.

(d) That appellant carelessly and negligently failed to open the flood gates sufficiently to permit the accumulated waters of the stream to flow gradually past the dam as they were wont to do by nature.

(e) That on or about midnight on December 21, 1933, appellant "opened all its aforesaid flood gates" and thereby caused vast quantities of water to be discharged into the river, increasing the volume and force of the river, causing backwater to form behind the apron, to enter the power house, and to disable the machinery, and that appellant was then unable to close its flood gates, causing the gates to remain open for approximately twenty-four hours, during which period approximately 17,000 acre feet of water were discharged through the flood gates, in addition to the normal flow of the stream, and that that result was all due to appellant's negligence in the construction of its dam, power house and flood gates.

Appellant by its answer (Tr. 11-19) admitted its ownership and operation of the project, and admitted the allegations of the complaint as to the number and size of the flood gates; denied that water could be impounded to any elevation in excess of approximately 238.35 feet without spilling water over the gates themselves, if closed; denied that the power house was constructed immediately below the base of the dam; denied that if the waters of the lake rose above approximately 240 feet elevation by the gauge, or to any other elevation, they would be discharged into or upon the power

plant or would do any damage to it, and denied that in the location, erection or construction of the power plant or of the power generating machinery appellant was in any respect careless or negligent; admitted that it was impracticable to permit the waters of the river so to accumulate in the lake as to pass over the top of the dam, and alleged that the dam was not designed to discharge the waters of the lake in that way. Appellant denied that the bulkhead or guide walls of the apron immediately below the flood gates were designed to protect the power plant, and denied that their effect was to increase the quantity of the water, or to increase its velocity except for a short distance downstream from the apron, and denied that any damage to appellees' lands was due to any negligence of appellant.

By its further affirmative defense appellant alleged that the Lewis River was a navigable stream, and that in the construction of its dam appellant had been required to obtain and had obtained the permission of the United States Government, acting by and through the Federal Power Commission, and had also been required to obtain and had obtained the permission of the State of Washington, acting by and through its Department of Conservation and Development (Tr. 16-19), but as appellant offered no testimony there is nothing before the Court in support of these affirmative allegations except in so far as testimony supporting them was furnished by appellees' own witnesses. (Tr. 90, 91, 98, 106, 179).

Appellant by its answer further alleged that the unprecedented rainfall, high temperatures and melting

snows concurring during December, 1933, resulted in unprecedented flood conditions in the Lewis River and in unprecedented hazards and perils from the flood waters, and that during the flood appellant had maintained and operated the flood gates of its dam in accordance with the best engineering practice and skill, consistently with the flood perils existing at said time and place, and solely with the purpose of minimizing the damage that would inevitably result to lower landowners on the stream by reason of the natural runoff of the flood waters. (Tr. 16-17). Appellant further alleged that the flood was an act of God for which it was in no way responsible or liable; that any damage sustained by appellees was solely due to such unprecedented flood, and that none of their damage was caused by or resulted from any negligent act or omission of appellant in the construction, maintenance or operation of its dam, flood gates, power house or other facilities, and denied affirmatively that appellant was at any time or in any way careless or negligent in the construction, maintenance or operation of any of said structures, or otherwise. (Tr. 17-18). Appellees' reply put in issue all affirmative allegations of appellant's answer, so far as inconsistent with the allegations of their second amended complaint. (Tr. 19).

Appellees' lands lie wholly on the Clark County side of the Lewis River (Tr. 162), and some seven or eight miles below the Ariel dam (Tr. 172), or about four miles up the river from Woodland. (Tr. 183). The deed to the property calls for 100.6 acres. (Tr. 166). Mr. Grieger, one of the appellees, is a dairyman. (Tr. 152).

At the times involved in this action the improvements on his farm consisted of two residences (Tr. 153), two barns, and several other small buildings. (Tr. 154-155).

Prior to the flood of December, 1933, the course of the river ran "pretty straight" toward appellees' lands (Tr. 72), but on their easterly boundary the river turned its course and ran northwesterly along the east boundary of the Grieger land, and on the northwest corner of the lands it turned again and flowed down along their west side. (Tr. 155). As the river approached the Grieger property there was a low place or swale where a jetty or sheer boom had been built to turn logs coming down the river. Without the sheer boom the logs would run about a quarter of a mile right along between there and the river. (Tr. 111-112; 120-121). A pencil sketch, made of the lay of his lands by Mr. Grieger, was admitted in evidence as appellees' Exhibit 18, for illustrative purposes. (Tr. 162). This sketch shows the bend in the river and the river's channel as it existed before the flood of December, 1933, and also shows where the Grieger lands were cut into and eroded by the flood. (Tr. 162). The distance from the east to the west boundaries of appellees' lands is approximately 1300 feet, but prior to the flood the river travelled "in the neighborhood" of three quarters of a mile around them, as indicated where the red and black lines are together on Exhibit 18. (Tr. 163).

Water started over the banks of the Grieger pasture and farm land on December 20th (Tr. 70; 167), but no cutting was observed on that day. (Tr. 69). No cutting was observed on the Grieger land up to the 21st. (Tr.

158). When Grieger came out in the morning of Thursday, the 21st, the water on his place was five or six feet deep (Tr. 169), and was fairly high at noon of that day. (Tr. 170). From three to five feet of water was flowing through Grieger's farm on the afternoon of the 21st. (Tr. 172).

During the flood the river cut its way approximately straight across appellees' bottom lands, as indicated on Exhibit 18, eroding the soil clear to the gravel, cutting out some of appellees' timber, creating holes of various sizes, and leaving heavy deposits of sand in some places. (Tr. 163-164). Driftwood consisting of trees from four inches to a foot and a half through, including three or four big cottonwoods, were deposited on the Grieger lands, there being as many as 21 trees counted in one pile after the flood. (Tr. 159). One big cottonwood tree was washed up on top of two apple trees, where it was resting after the flood. (Tr. 159). Piles of coarse sand were created from six inches to six feet deep, and after the flood two large cottonwoods were lying on a big sand pile. (Tr. 159-160). Seven pictures of appellees' property, taken after the flood, were admitted in evidence as appellees' Exhibits 1 to 7 (Tr. 65-66), and a picture depicting the type of sand washed in was admitted in evidence as appellees' Exhibit 17. These pictures graphically show the ravages of the flood. Appellees' fences were carried away (Tr. 160) but no physical damage to any of appellees' buildings was claimed.

Approximately 45 acres of appellees' lands were eroded and washed away by the flood, and appellees claimed that "in the neighborhood" of 30 or 35 acres were

covered with sand (Tr. 160), but on the trial appellees found that they were including a claim for sand damage to some fifteen or twenty acres which lie north of their line and which were not within the call of their deed or in their complaint. (Tr. 166-167).

Appellees' engineer, W. J. Roberts, expressed his familiarity with the Lewis River over a period of 24 years, and testified that "throughout time" the river had travelled in different channels (Tr. 186); that it is the habit of rivers to do that sort of thing. (Tr. 187). The silty loam of which the Grieger farm was composed (Tr. 156) is light, and the finest matter that floats, and is readily subject to erosion. The Grieger soil which was washed out in the flood of December, 1933, was the very soil that was brought in and settled there as the result of erosion of up-river lands in prior floods. (Tr. 187). It is the cutting element of the water that results in erosion; as the water comes up under the bank it cuts in, and as it goes over it cuts a little more; that is the way erosion works. (Tr. 188). It is the volume of water and the velocity of it that effects the erosion. (Tr. 189). Erosion started on the Grieger place on the edge of the old river channel, pretty early in the flood stage. As the water came up, the erosion would come up a little farther. Silty loam would start to erode at a velocity of four or five feet per second. (Tr. 191). Erosion might start on the Grieger place when the discharge at the dam was somewhere around 50,000 second feet, and as the discharge increased the erosion would increase, especially in a tortuous ox-bow and horseshoe bend, as at the

Grieger place. Such a bend is very subject to erosion. (Tr. 193-195).

Erosion depends upon the velocity of the stream, and not the height of the stream, but the fuller the stream is, the more water flows, and then the swifter it becomes. They go together. (Tr. 180). Water is very inelastic, and would have a considerable slow-down after leaving the tailrace of the dam. (Tr. 179). If water is spilled into a pool it tends to stop the speed. There is a very deep pool in the river just below the spillway; that would tend to slow the velocity. (Tr. 184).

The velocity of a stream depends on "the slope of the channel and nothing else." (Tr. 194). The degree of slope is the difference in the elevations at two points, divided by the horizontal distance. (Tr. 185). To figure the velocity of water between any two points one must know the head or slope, the course of the stream, the elevations of the bed of the stream, and the width and condition of the banks. (Tr. 184). No such measurements or computations were made in the instant case (Tr. 185), nor was any study made to determine at what second-foot flow of the river it would overflow the bank at the Grieger place, though such determination could have been made approximately. (Tr. 189-190).

From the known data as to the area of the lake and the lowering of the elevation of the water from midnight of December 21st to midnight of December 22nd, appellees' engineer computed that the quantity of water discharged through the gates in that 24-hour period exceeded the natural stream flow during such 24-hour period by 13,600 acre feet (Tr. 185), or a little less than

6% of excess water over and above the natural stream flow at the time. 13,600 acre feet was equivalent to a flow of 6800 second feet during that 24-hour period. (Tr. 177).

All or any of the flood gates could have been closed by hand at any time. (Tr. 124-125). The several changes of position in gate No. 5 between 12:16 A. M. on December 22 and midnight of that day (Tr. 142-143; Appendix, Table I, page IV), and the net lowering of the elevation of the lake to the extent of four feet during the corresponding time, as shown by Exhibit 13, all represented the exercise of the judgment of the operators of the dam, whose judgment was prompted by their knowledge of the way the river had acted at other times when there was a freshet, and by the heavy rainfall then continuing, and by the probability that on the night of the 22nd they would experience a still greater rise of the river than had been encountered up to that time. (Tr. 87). The holding back of water during the 21st had been ordered after conference with the Mayor of Woodland. (Tr. 143).

The primary question involved on this appeal is whether there is any competent evidence to support the verdict, or any verdict, in appellees' favor. (Tr. 40-197). This question was raised, successively, (1) by appellant's motion for a nonsuit (Tr. 198), which was denied and an exception allowed (Tr. 198); (2) by appellant's petition for a new trial (Tr. 20), which was denied and an exception allowed (Tr. 23), and (3) by appellant's assignment of errors. (Tr. 30).

## ASSIGNMENT OF ERRORS

(Tr. 30-31; Bill of Exceptions, 110, 111).

NOW COMES Inland Power & Light Company, a corporation, defendant in the above numbered and entitled action, and, in connection with its petition for an order allowing an appeal in said action, assigns the following errors which said defendant avers occurred upon the trial thereof, and upon which it relies to reverse the judgment entered herein, as appears of record:

I.

That the Court erred in denying said defendant's motion for nonsuit, made at the close of the plaintiffs' case, upon the several grounds that: (1) the plaintiffs had wholly failed to prove any actionable negligence; (2) that the evidence conclusively showed that an unprecedented flood caused the damage to plaintiffs' property, regardless of any conduct of the defendant; (3) that the evidence affirmatively showed reasonable care by the defendant; and (4) that any verdict rendered on the evidence would be purely speculative and without basis for computation.

II.

That the Court erred in entering judgment on the verdict herein, in that said verdict was against law and unsupported by the evidence.

III.

That the Court erred in denying said defendant's motion for a new trial herein, in that the Court thereby erred as a matter of law, and failed to exercise a sound judicial discretion.

WHEREFORE said defendant prays that the judgment of said Court be reversed.

# ARGUMENT

## ASSIGNMENT OF ERROR NO. I

**That the court erred in denying said defendant's motion for nonsuit, made at the close of the plaintiffs' case, upon the several grounds that: (1) the plaintiffs had wholly failed to prove any actionable negligence; (2) that the evidence conclusively showed that an unprecedented flood caused the damage to plaintiffs' property, regardless of any conduct of the defendant; (3) that the evidence affirmatively showed reasonable care by the defendant; and (4) that any verdict rendered on the evidence would be purely speculative and without basis for computation.** (Tr. 30-31).

Said Assignment of Error No. I specifies four separately numbered grounds of error in the denial of appellant's motion for a nonsuit. We will discuss these grounds separately.

### 1. Plaintiffs wholly failed to prove any actionable negligence

(Assignment of Error No. I; First Ground Assigned; Tr. 30)

Directing attention to the allegations of the complaint, we will point out from the record (a) the substance and scope of the evidence offered by appellees, (b) what appellees were required to prove but failed to prove, and (c) why appellees' own proofs constituted a complete defense to their allegations of negligence.

It should be borne in mind that the testimony under review is that of the appellees alone. Appellant offered no testimony, for the reason that appellant believed and

still believes that appellees not only failed to sustain their charges of negligence, but by their own witnesses proved the affirmative defenses pleaded in appellant's answer. (Tr. 16-18).

The negligence charged in appellees' second amended complaint consists, in general, of (1) alleged defective and negligent construction of the Ariel power plant itself; and (2) alleged negligence in the operation of the flood gates and in the handling of the flood waters. (Tr. 4-8).

**1-A There is no evidence of defective or negligent construction of the project**

The allegations involving negligent construction of the power plant, all of which were put in issue by the denials of the answer, are, in substance:

(a) That the power house and power-generating machinery were erected "below the base of the dam", with the alleged result that if the waters rose in the reservoir above a gauge height of 240 feet they would be discharged over the top of the dam and into and upon the power plant, and that, if so discharged, "great damage" would thereby be inflicted upon the power house and upon its machinery. (Compl. Par. IV; Tr. 4-5).

(b) That the apron erected immediately below the base of the dam, with bulkheads at its sides, was erected (1) for the protection of the power plant, and (2) that the effect of the apron was to increase "not only the quantity of water" but the force and violence of the

water released through the flood gates. (Compl. Par. IV; Tr. 5).

Matters relating to the construction of a plant of this character are of course in the field of engineering, and presumably for the purpose of supporting these allegations appellees called as their witnesses two engineers, namely, W. J. Roberts, of Tacoma (Tr. 175-197), and Lyman Griswald, of Portland. (Tr. 144-150). Neither of these engineers was asked a single question involving, or which was designed to furnish any information concerning, any of these allegations of negligence in the construction of the power plant, nor did they or any other witness give any testimony regarding such allegations. No testimony was offered to show how close to the base of the dam the power house was located, or as to whether, if the lake waters were discharged over the crest of the dam, they would reach the roof of the power house in falling, or as to whether they would cause any damage if they did fall on it. (See Tr. 4-5).

As to the effect of the apron erected immediately below the base of the dam, with bulkheads at its sides, forming a chute, and which was alleged "to increase not only the quantity of water in said Lewis River below the dam, but the force and violence of such water as might be released through the flood gates", (Tr. 5) we have long wondered how this apron or chute could increase the *quantity* of water in the river, since it obviously could pass along only so much water as was being discharged upon it through the flood gates at the time, and which of necessity would flow down the river whether the apron or chute were there or not.

Further, there is no evidence that the apron or chute increased the force or violence of the water released through the flood gates. The only testimony touching this matter was that furnished by engineer W. J. Roberts, who when asked as to what effect the fall of the water from elevation 205 (the spillway crest) would have on the lower stream, replied, in substance, that whatever fell through the gates would be added to the water of the stream below—which is merely a statement of the obvious—but that it should be remembered that "water is very inelastic, and that it will have a considerable slow-down before it goes very far from the tail-race", adding that the fall of the water would increase the velocity of the stream "a little", but that the velocity depended "on the slope of the stream"—a matter to which we will later direct more detailed attention.

So far as disclosed by the record, there is not an iota of proof of any defective or negligent construction of the plant, or even a suggestion that the power house should have been differently located or constructed. The mere undisputed fact that the overwhelming flood finally made it advisable to shut down the plant and temporarily disconnect the supply of electricity for the operation of the gates (Tr. 131-133) is wholly without significance or relevance to any charge of negligent construction.

Not only did appellees' witnesses fail to offer a word of criticism of the construction of the power plant, or the breath of a suggestion that in any respect it should have been located or constructed differently, but they brought out in their testimony enough to establish one of appellant's affirmative defenses, namely, that the plant had

been constructed by permission of the United States Government, acting by and through the Federal Power Commission, as well as by permission of the State of Washington, acting by and through its Department of Conservation and Development. (See Answer, Tr. 16-17). The testimony of appellees' witness, E. J. F. Calkins, an engineer in the United States Bureau of Geological Survey at Tacoma, shows the jurisdiction exercised by the Federal Power Commission over the project (see Tr. 91-92, 98), pursuant to the Federal Water Power Act (Act of June 10, 1920, Chapter 285; 41 Stat. 1063; 16 U. S. C. A., Sections 791-823). In that Act a project of this character is defined as follows:

> " 'Project' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith," * * * (16 U. S. C. A., Sec. 796)

Section 9 of the Federal Water Power Act further required the approval by the Federal Power Commission of maps, plans and specifications for such a project, and required all subsequent changes therein to be similarly approved by the Commission. (U. S. C. A., Sec. 802).

Said Section 9 also required the applicant desiring to construct such a project to furnish to the Federal Power Commission satisfactory evidence that all applicable requirements of state laws had been complied with. Said Section 9, in its entirety, is as follows:

"*Information to accompany application for license.* Each applicant for a license hereunder shall submit to the commission—

(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

(c) Such additional information as the commission may require." (Act of June 10, 1920, c. 285, sec. 9, 41 Stat. 1068; 16 U. S. C. A., Sec. 802.)

The State of Washington's jurisdiction, acting by and through its Department of Conservation and Development, is set forth in the State Water Code, Section 7358 of Remington's Revised Statutes of Washington, which is a part of the Water Code, as follows:

"7358. *Powers and duties of engineer.* There is hereby imposed upon the state hydraulic engineer the following duties and powers:

(1) The supervision of public waters within the state and their appropriation, diversion and use, and of the various officers connected therewith.

(2) In so far as may be necessary to assure safety to life or property, he shall inspect the construction of all dams, canals, ditches, irrigation systems, hydraulic power plants, and all other works, systems and plants pertaining to the use of water, and he may require such necessary changes in the construction or maintenance of said works, to be made from time to time, as will reasonably secure safety to life and property."

Section 7388 of Remington's Revised Statutes of Washington provides:

"7388. *Storage dams—Approval by engineer.* Any person, corporation or association intending to construct any dam or controlling works for the storage of ten-acre feet or more of water, shall, before beginning said construction, submit plans and specifications of the same to the state hydraulic engineer for his examination and approval as to its safety. Such plans and specifications shall be submitted in duplicate, one copy of which shall be retained, as a public record, by the state hydraulic engineer, and the other returned with his approval or rejection indorsed thereon. No such dam or controlling works shall be constructed until the same or any modification thereof shall have been approved as to its safety by the state hydraulic engineer."

Section 10760 of Remington's Revised Statutes of Washington provides:

"10760. *State departments created.* There shall be, and are hereby created, departments of the state government which shall be known respectively as, * * * (5) the department of conservation and development";

and Section 10819 thereof provides:

"10819. *Department of conservation and development—Divisions.* The department of conser-

> vation and development shall be organized into, and consist of, five divisions, to be known respectively as, * * * (5) the division of hydraulics."

In this connection it will be noted that appellees' engineer, in discussing construction details of the Ariel project, testified as follows:

> "These notes to which I am referring were not made upon the hearing; these are the drawings of the structure of the gates and the dam; they were made by my assistant under my direction about April, 1934; I was there at the time they were made. I might add to that, to make it clear to the court and the jury, if it is permissible, that there were obtained from the Hydraulic Engineer of the State of Washington, the notes about the size and openings, and they agree, accord, exactly, with the testimony that has been given here. I got them from the records myself." (Tr. 179).

The presence of this information in the office of the State Hydraulic Engineer of the State of Washington, as an official public record, confirms the presumption of lawful compliance by appellant with the applicable state statutes and the presumption of proper performance of the official duties of the State Hydraulic Engineer.

It thus appears from the record that appellant's first affirmative defense, wherein it is alleged that the project was constructed in compliance with federal and state laws, was established out of the mouths of appellees' own witnesses.

The status of appellant's Ariel project, as one duly authorized by governmental authority, has been twice presented to and recognized by the Supreme Court of

the State of Washington. In *Funk v. Bartholet, State Supervisor of Hydraulics,* (1930) 157 Wash. 584; 289 Pac. 1018, after citing the pertinent sections of the Washington statutes, the Supreme Court of Washington, sitting *en banc,* quotes the findings made by the State Supervisor of Hydraulics upon the application of Inland Power & Light Company, appellant herein, for a permit to appropriate and store 4000 cubic feet per second of the waters of the Lewis River at the Ariel site, among which findings appears the following: (289 Pac., at 1021)

> "The applicant has made extensive surveys, studies and investigations of the proposed development, including an elaborate geological study by diamond drilling and excavation of the dam sites; the applicant has also in cooperation with the United States Geological Survey, made gauging and kept records of the stream flow for many years;"

The Supreme Court of Washington in the same case quotes the Findings of Fact entered by the State Supervisor of Hydraulics as a basis for his issuance of appropriation and storage permits for the Ariel project, and for his decision that such permits should issue upon payment of the required fees, such findings, among others, including the following: (289 Pac. at 1021)

> "IV. That the plan of development proposed is in line with the highest feasible development of the waters of the stream.
>
> "V. That the applicant, the Inland Power & Light Company, has the financial and engineering ability to develop the project as proposed and that it intends in good faith to proceed with such development;"

In *Funk v. Inland Power & Light Company,* (1931) 164 Wash. 110; 1 Pac. (2d) 872, the issuance of such state permits to appellant for its appropriation and storage of the waters of the Lewis River at Ariel was again recognized and commented upon by the Supreme Court of Washington.

It is not alleged or claimed that appellant's project was unlawfully constructed, or that the project in any way constituted a nuisance, and no such contention could be made. In this connection we invite the Court's attention to the case of *Jeffers v. Montana Power Co.,* et al., (1923) 68 Mont. 114; 217 Pac. 652, in which it was charged that the operations of the power company and its manipulation of the flow of the Madison river caused ice jams to form in the river, with the result that when the flow of the river was increased as an incident to the operation of that company's Hebgen dam, the river channel became incapable of carrying the water, causing it to overflow plaintiff's lands, to his damage, and that such damage was proximately caused by the operation of the dam in the manner alleged. In affirming a judgment, following a directed verdict in favor of the power company and other defendants, the Supreme Court of Montana says (217 Pac., at page 659) :

> "The impounding of the waters of the Madison river in the Hebgen reservoir and the transportation of them through the channels of the Madison river for a lawful purpose, being a lawful business, it cannot be said that to do so is a nuisance per se. 29 Cyc. 1159.

> "It is fundamental that without a wrong there is no cause of action, * * *. The mere fact that the plaintiff may have suffered damage is not of itself sufficient; there must be the violation of a duty recognized by law. * * *
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> "That persons impounding waters are not insurers against damage caused thereby, but are held only to the exercise of ordinary care in the construction and operation of their plants is so clearly and forcibly pointed out by Mr. Justice Holloway in the case of Fleming v. Lockwood, 36 Mont. 384, 92 Pac. 962, 14 L. R. A. (N. S.) 628, 122 Am. St. Rep. 375, 13 Ann. Cas. 263, that doubt can no longer exist as to the rule established in this state:"

By alleging affirmatively in its answer that its Ariel project was constructed pursuant to state and federal authority, appellant did not, nor does it now, imply that such authority allowed appellant *to operate* its plant negligently, or negligently to damage anyone's property. That defense was intended solely to negative the charge of the complaint that the plant was in any respect negligently *constructed,* and the facts and authorities above referred to fully establish that affirmative defense.

**1-B There is no evidence of negligence in appellant's operation of the flood gates, or in appellant's handling of the waters**

The allegations of appellees' complaint in respect of alleged negligence in the control exercised by appellant over the waters of the river, and in appellant's operation of the flood gates are, in substance:

> That notwithstanding the rainfall and rising waters of the river (and the alleged negligent con-

struction of the dam), appellant (a) negligently permitted the waters of the lake to rise and remain at or above elevation 235; and (b) negligently failed to open its flood gates sufficiently to permit the accumulated waters to flow gradually past its dam, "as they were wont to do by nature"; and (c) on or about midnight of December 21, 1933, "carelessly and negligently * * * opened all its aforesaid flood gates" and thereby caused vast quantities of water, "so carelessly impounded" by the dam, "to be suddenly and with great force discharged", thus increasing the volume and force of the river and thereby disabling the power house machinery, so that "defendant was unable to close its said flood gates" and they "were forced to remain open" for approximately 24 hours, and that during such 24-hour period approximately 17,000 acre feet of water, in addition to the normal flow of the river, were discharged through the flood gates; all to appellees' damage. (Tr. 5-8).

Although the proper method of operating a project of this character would appear to be a subject in the field of engineering knowledge, equally with matters of proper project construction, neither of appellees' engineers, nor any other witness, was asked a single question as to the elevation at which the waters of the lake should have been maintained during the rainy season or during any other season, or as to why or in what respect appellant could be held to be negligent in maintaining the water level of the lake at or above elevation 235; nor did any witness offer any testimony as to the level at which the lake should have been maintained, other than the testimony of the witness David J. Shore that

the normal operating head, or level, was elevation 235. (Tr. 135).

So far as concerns safety of riparian lands along the river, it matters not one whit at what elevation the waters of the lake are maintained. This is as true during flood seasons as at any other time. As long as the outflow of the lake equals its inflow, the elevation of the lake will remain stationary. As shown by the testimony, the only outlets of the waters of the lake are the penstock leading to the power house, which has a capacity of something over 3,000 second feet (Tr. 78), and the five flood gates, which are shown to have had a combined discharge capacity of 129,000 second feet when the lake elevation was 237.6. (Tr. 93, 97 and Ex. 13). If we consider the lake or reservoir as a large box or barrel it is obvious that if 30,000, 60,000 or 90,000 second feet of water is flowing down the river and entering the lake at its upper end, and an equivalent quantity is at the same time being discharged through the gates and the penstock, the lake elevation will remain stationary at whatever elevation it may happen to be at that particular time. When the line made by the pencil on the recording chart (Exhibit 13) indicates a rise in lake elevation, it is because more water is entering the lake at the time than is being discharged through the gates and penstock. Conversely, when such line on the chart indicates a lowering in lake elevation, it is because more water is being discharged through the gates and penstock than is entering the lake from above. (See Tr. 78-79). Whenever the quantity of water entering the lake exceeds the discharge capacity of the penstock, if such excess were not spilled through

the gates "it would build up like in a rain barrel and run over the top." (Tr. 82).

It should be remembered that any water in the lake, to the extent of the penstock capacity, may be discharged through the penstock, but the flood gates cannot discharge any water that is below elevation 205, as elevation 205 is the spillway crest, or the elevation at the bottom of the gates. (Tr. 182).

If the waters of the river were at all times required to flow, and allowed to flow, past the dam "as they were wont to do by nature", there would be no hydroelectric project at Ariel, and no rights could be exercised under the reservoir permit granted by the State of Washington for this project, for the reason that every drop of water stored in the reservoir represents, *pro tanto,* a diminution of the flow of the stream "as it was wont to flow by nature". If that were the law in the State of Washington there would be no hydroelectric development on any river in the state. However, that is not the law.

In *California-Oregon Power Co. v. Beaver Portland Cement Co.* et al., (1934; C. C. A. 9th) 73 Fed. (2d) 555 (affirmed in 295 U. S. 142; 79 L. ed. 1356), this Court, after pointing out that by legislation and judicial action the common law doctrine of riparian rights had been variously modified in the western states, says, with special reference to the law in the State of Washington (at page 564):

> "In Brown v. Chase, 125 Wash. 542, 217 P. 23, 25 (1923), the court, departing from earlier general expressions in its opinions, held that a riparian

owner was not entitled, as against an appropriator, to the undiminished flow of the stream if that flow was not of substantial benefit to him; it said: '* * * while this court has recognized the common-law riparian rights, it has also modified and enlarged that doctrine by ingrafting upon it the necessity of beneficial use by the riparian owner, refusing relief where the riparian owner was not substantially damaged, and granting relief where he was either presently or prospectively so damaged.'

"And in Proctor v. Sim, 134 Wash. 606, 236 P. 114, 117 (1925), the same court said: 'For years past the trend of our decisions and the tenor of our legislation have been to restrict and narrow the common law of riparian rights. * * *' In harmony with that development, the provision of the 1917 Water Code of that state, saving 'the existing rights of any riparian owner,' was construed to protect only 'the right to the beneficial use of such portions of the waters of the lake as are either directly or prospectively, within a reasonable time, proper and necessary for the irrigation of their lands and for the usual domestic purposes."

On this subject the chief operator of the Ariel project, David J. Shore, testified (Tr. 89-90):

"The gates are used to maintain the level of the water in the lake. To illustrate, using the moulding of the Judge's desk as an illustration, as the water comes up, if I didn't open the gates the water would keep coming up. In order to hold it at that level we operate these gates. If the water coming down the river is more than is required to pull the load, and the water starts to build up to a given point, we start to open the gates a little bit to keep it at stream flow. In other words, if the water starts to come above the 235 mark, then we open that little gate a little bit, enough to hold that line. Our effort in the operation of that dam at all times is a stream

> flow operation. After we get our winter storage, then we try so to operate the gates as to let the outflow in our gates equal the intake of the stream above; just like if we was not there."

Further details of the operation of the gates in an effort to maintain stream flow at all times will be found in the testimony at pages 49-50, 78-79, 83-84 of the Transcript of Record. In this connection Exhibit 9 shows the *mean daily* lake elevation for the entire month of December, 1933 (recapitulated as part of the data shown in Table II of the Appendix to this brief), from which will be observed what a narrow fluctuation in lake elevation was permitted, although the discharge of water through the gates during that month varied from 1000 second feet on December 1st to 129,000 second feet on December 22nd. The greatest variations in lake elevations occurred during the critical stages of the flood, or from December 20 to December 22, both dates inclusive. These occurred for reasons disclosed in the testimony, and which we will later discuss.

While appellees alleged that appellant "carelessly and negligently permitted the water of Lake Merwin to rise and remain at a gauge elevation of 235 feet and above the said point", neither in their complaint nor in their testimony is it pointed out at what elevation the water should have been maintained. As already stated, it is physically impossible to lower the lake below elevation 205 at any time when the natural stream flow coming into the lake exceeds the approximately 3,000 second feet carrying and discharge capacity of the penstock. As a practical proposition, even with all the gates wide

open, the lake could not be maintained at elevation 205 whenever the stream flow exceeds the carrying capacity of the penstock, for by whatever quantity the stream flow exceeds the penstock capacity, that excess must be discharged over the crest of the spillway, with a water surface elevation always greater than 205, dependent upon the quantity of water being spilled. A reference to Exhibit 10 discloses that a condition of mean stream flow in excess of 3,000 second feet existed at each and every day from December 4 to December 31, 1933, both dates inclusive. Assuming, for the sake of the argument, that on December 3, 1933, the level of the water in the reservoir was down to elevation 205, and all gates were then fully open, it is obvious that on each subsequent day of that month the height of the water above elevation 205 would be commensurate with the quantity of water then flowing into the lake in excess of the discharge capacity of the penstock.

With this conception of the situation, and with the mean lake elevations shown on Exhibit 9 in mind, let us look at Exhibit 10, which shows discharges, in *second feet,* as follows: 46,600 on December 18; 40,200 on December 19; 44,600 on December 20; 84,600 on December 21, and 114,000 on December 22 (midnight to midnight of each day). The stated flows on December 18, 19 and 20 were each far in excess of the entire capacity of one of the large gates; and on the 21st the natural stream flow nearly equalled the capacity of three of the large gates, or over 60% of the entire discharge capacity of all five gates, each of the large gates having a discharge capacity of approximately 30,000 second feet, and the

small gate a capacity of some 7,000 second feet, at elevation 237. (Tr. 79). With close to two-thirds of the discharge capacity of the gates thus utilized on December 21, by a discharge of water which was *less than the natural stream flow* (for Exhibit 9 shows that the lake elevation rose on that day from 234.6 to 236.9; Tr. 92), there at once becomes apparent the absurdity of the intimation of paragraph V of the complaint that appellant could or should have kept the lake down to elevation 205, or at any rate should not have "permitted the water of Lake Merwin to rise and remain at a gauge elevation of 235 feet and above that point." (Tr. 5-6).

Just one more illustration will demonstrate our point with mathematical accuracy and even more graphically. The reservoir covered four thousand acres. If it be assumed that it had vertical sides like a box, and that the elevation of the lake could have been lowered to 205 at midnight on December 20th, then obviously the maximum storage capacity of such reservoir or box would be the difference in elevation between elevation 205, which is the crest of the spillway (Tr. 182) and elevation 240, which is admitted in the pleadings to be the top of the dam, or 35 feet; and therefore 35 multiplied by 4,000 gives the maximum storage capacity of such box or reservoir, or 140,000 *acre feet.* However, the mean discharge from midnight of December 20 to midnight of the 21st was 84,600 *second feet* (Ex. 10), which is the equivalent of 169,200 acre feet, since one second foot flowing for twenty-four hours equals two acre feet. (Tr. 177). Assuming, therefore, that appellant could have performed the impossible and could have caused

the elevation of the lake level to have been lowered to elevation 205 at midnight on the 20th, and had closed all the gates at that time, the water surface of the lake at midnight on the 21st would have stood at elevation 240, and the difference between 169,200 acre feet and 140,000 acre feet, or 29,200 acre feet, would have been spilled over the dam during the 21st. But of course the sides of the reservoir are not vertical like a box, so the suggested theoretical maximum available storage capacity on the 21st would be somewhat less than 140,000 acre feet, and the discharge for that day would have somewhat exceeded said 29,200 acre feet after utilizing such maximum available storage capacity.

And what would happen on the 22nd, with the lake thus brim full to elevation 240, and running over at midnight on the 21st, as we have just shown? During December 22nd, that is, from midnight of December 21st to midnight of December 22nd, the *mean discharge* for that 24-hour period was a flow of 114,000 second feet (Ex. 10), an amount equivalent to 228,000 acre feet. (Tr. 177; 185). Deducting from this 228,000 acre feet (or flow of 114,000 second feet), the estimated flow of 6,800 second feet which engineer Roberts testified was discharged in excess of the natural stream flow, we have left a *natural mean stream flow* for the 22nd represented by the difference between 114,000 second feet and 6800 second feet, or 107,200 second feet.

So whatever futile efforts appellant might have exerted to start the day of the 21st with the lake elevation at 205, and had that been possible, which of course it was not, the disastrous flood of the 22nd would have

*averaged 107,200 second feet of natural stream flow,* and no power of man could have prevented it.

We will now discuss appellees' allegations that on or about midnight of December 21, 1933, appellant "carelessly and negligently * * * opened all its aforesaid flood gates" and thereby caused vast quantities of water "so carelessly impounded" by the dam "to be suddenly and with great force discharged" into the river, thus increasing the volume and force of the river and thereby disabling the power house machinery, so that "defendant was unable to close its said flood gates" and they "were forced to remain open" for approximately 24 hours, and that during such 24-hour period approximately 17,000 acre feet of water, in addition to the normal flow of the river, were discharged through the flood gates, and that such alleged increase in the volume and force of the river resulted in the damage to appellees' property, in the demanded sum of $15,150.00. (Tr. 7-8).

As to these allegations we may again truthfully repeat that not one of appellees' witnesses discussed, or offered a word of criticism concerning the control exercised by appellant over the flood waters or concerning appellant's handling of the flood gates during the flood, or made any suggestion or intimation as to how or why the flood waters or the flood gates should have been handled in any different manner, or as to possible or probable effects on the river or upon appellees' lands from the handling of the flood waters or the flood gates in any manner differently from that shown in the record.

The allegation that on or about midnight of December 21, 1933, appellant "opened all its aforesaid

flood gates" was obviously intended to create the impression that, at the time stated, *all* of the gates had been closed and were then *all simultaneously* opened. The very records which appellees offered in evidence prove the impossibility of that's being true. Having shown the mean daily elevation of the waters of the lake for the entire month of December by their Exhibit 9, and having also shown the mean daily discharge of the river in second feet for that entire month by their Exhibit 10, and it being undisputed that the waters never flowed over the top of the dam (Tr. 44; 136; 178), we invite appellees' explanation as to how the waters of the river got past the dam during the period of December 18 to December 21, both inclusive, if the flood gates were not then open sufficiently to discharge such waters, as during those days the mean daily discharge of the river below the dam, as shown by their Exhibit 10, was respectively, 46,600, 40,200, 44,600 and 84,600 second feet, of which only approximately 3000 second feet was capable of being discharged through the penstock. Exhibits 9 and 10 show themselves to be official publications of the United States Geological Survey, and in connection with them the witness Calkins, an engineer for that government office, testified that the mean daily elevations of the waters of the lake shown on Exhibit 9 were computed from the record made by the water stage recorder at the dam (Ex. 13), and that the mean daily discharges of water below the dam, in second feet, were computed by the use of a mechanical integrator during the period that the government's recording station below the dam

was functioning (Tr. 99-100) and that for the period beginning on December 18, and while that station was out of commission, due to the flood, such computations were made by using the records made at the Ariel dam, where the size of the gates, the extent to which they are open at any given time (Ex. A-2), and the water surface elevation record shown on the chart (Ex. 13) are known. (Tr. 101; 107). We leave it to appellees now to explain to this Court how these exhibits and such testimony can be successfully impeached or disputed, especially in view of the fact that they did not attempt to do so upon the trial, but, on the contrary, relied on these very exhibits and testimony to show that the peak flood was 129,000 second feet, that the lake elevation was lowered during December 22nd, and that from such data their engineer Roberts estimated that during December 22nd appellant increased the natural flood flow of the stream by a flow of only 6800 second feet. (Tr. 177). The foregoing conclusively shows the absurdity of any claim that the gates were all opened at once.

We have heretofore discussed the allegation that the waters of the lake were "so carelessly impounded" behind the dam (ante, pp. 43 to 47), and nothing need here be added to what is there said.

The allegation that at or about midnight on December 21, 1933, appellant "opened all its aforesaid flood gates" and thereby caused "vast quantities of water * * * to be suddenly and with great force discharged through its said flood gates", naturally provokes the inquiry as to what the existing gate positions were at that time, what change or changes were then made in

gate positions, and as to just how much additional water was thus discharged at that time. The record shows that gates Nos. 1, 2, 3 and 4 were already wide open at midnight of December 21st, and that gate No. 5 was then already open from 9 to 13 feet. Consequently, the "vast quantity" of water additionally imposed upon the stream *at that time* must of physical necessity be confined to the quantity which could be and was discharged as an incident to the completion of the opening of gate No. 5 to its maximum opening of 26½ feet at 12:16 A. M. on December 22nd.

Appellees did not undertake to have any witness calculate the probable additional discharge of water, if any, over and above the natural stream flow during the peak of the flood at midnight on the 21st, or in the early morning hours of the 22nd, although during the trial all existing data for such computations were available to them; nor did appellees offer any testimony to show just how much water that "vast quantity" was, other than to show that over the entire 24 hours of December 22nd, the lake was lowered four feet, and that the total discharge in excess of stream flow for the day was 13,600 acre feet, the equivalent of an *average or mean* flow for the day of 6800 second feet.

In figuring the quantity of water, if any, additionally imposed upon the natural stream flow upon completion of the opening of the last gate, certain factors must be taken into consideration if we are to arrive at a sound conclusion. The witness Shore testified (Tr. 133) that a little before midnight of December 21st gates Nos. 1, 2, 3 and 4 were fully open, these positions being

the result of many days' successive and gradual operations, and that the last gate, No. 5, was then open between 9 and 13 feet. At that time he ordered the last gate opened wide, and its opening was completed at 12:16 A. M. December 22nd; also that up to that time, notwithstanding the then existing gate openings, the water level of the lake was still rising. (Ex. 13; Tr. 133). The witness Shore also testified that at the time the opening of the last gate was completed the gates were "going clear full".

It is obviously impossible to open one of these large gates instantaneously and some appreciable time is required. The order to complete the opening of No. 5 gate was given shortly before midnight, December 21st, and it was finally fully open at 12:16 A. M. of December 22nd, indicating approximately 16 minutes of elapsed time required to complete the existing opening of from between 9 and 13 feet to its full opening of 26½ feet.

The Court will note that at page IV of the Appendix, Table I, footnote (3) reads as follows:

> "Lake elevation not accurately reflected in Exhibit 13 due to physical factors incident to opening gate No. 5."

It would be inferred from examination of Exhibit 13 that upon completing the opening of No. 5 gate, the lake level dropped a half foot in 16 minutes, implying a discharge of 2000 acre feet during that period. 2000 acre feet is equivalent to 87,120,000 cubic feet of water (2000 times 43,560). While the record is silent as to the reason for this apparent sudden drop in the lake elevation, which we will show to have been a physical impos-

sibility, one explanation, which we believe to be the correct one, is the proximity to gate No. 5 of the mechanism of the recording gauge and the stilling well which contains the float; so that the drop shown on the chart, representing a corresponding drop in the water surface of the stilling well, must have been due to the swirling action of the water created by the completion of the opening of gate No. 5, which caused a suction that affected the water level in the stilling well and thus caused the concurrent distorted recording by the pencil on the chart (Ex. 13). The correctness of this explanation is borne out by the examination of the record made by the pencil on the chart (Ex. 13) from midnight to 12:16 A. M. December 22nd — a 16-minute period — during which period the record on the chart indicated a drop of 0.5 feet in elevation, during which same 16-minute period gate No. 5 was being opened from its then position, between 9 and 13 feet of opening, to its full opening. The swirling action of the water which exerted a suction effect on the water level in the stilling well would not have been appreciable with No. 5 gate partly open, but would have increased in severity as the gate was further opened, reaching its maximum effect at 12:16 A. M. when the gate was finally fully open. The combination of a gradual opening of the gate and the correspondingly increasing suction effect on the stilling well would necessarily produce a record similar to that shown for the 16-minute period on the chart, yet without any appreciable change in the water level of the lake itself.

At 10:00 P. M. December 21st, with the lake elevation at 237.4 (Ex. 13) and with gates Nos. 1, 2, 3 and 4 fully open and gate No. 5 open 9 feet, the discharge was 105,000 second feet. (Tr. 129). At 12:16 A. M. with approximately the same lake elevation and all five gates fully open the discharge was 129,000 second feet (Tr. 97 and Tr. 133), indicating a maximum available discharge capacity of the final 17½ foot opening of gate No. 5 to be 24,000 second feet. As the final 17½ foot opening of gate No. 5 required the 16-minute period from midnight until 12:16 A. M., the average discharge capacity available during this period would be 12,000 second feet. 12,000 second feet flowing for 16 minutes, or 960 seconds, is equivalent to 11,520,000 cubic feet of water. It would therefore be impossible to discharge 87,120,000 cubic feet of water, the quantity represented by 0.5 of a foot drop in lake elevation, in 16 minutes through an opening capable of discharging but 11,520,-000 cubic feet of water during the same 16-minute period. The indicated drop in the lake elevation must therefore of necessity be due to other factors, and we believe the explanation just given is the correct one. Had any witness undertaken to testify that 2,000 acre feet of water could have been discharged in 16 minutes through a 17½-foot opening of gate No. 5, any court would have disregarded such testimony as unbelievable. It is contrary to physical possibility and equally unbelievable when distortedly indicated by the chart (Ex. 13). In *U. S. v. Kerr,* 61 Fed. (2d) 800, 803, (C. C. A. 9th; 1932), this Court says:

> "The physical facts positively contradicting the statement of a witness control, and the court may not disregard them. * * * Judgments should not stand upon evidence that cannot be true."

It will also be noted that the above calculations are based on conditions least favorable to appellant, namely, that No. 5 gate was open only 9 feet instead of somewhere between 9 and 13 feet, as testified to, at midnight of the 21st, and that the final opening was therefore 17½ feet additional instead of somewhere between 13½ feet and 17½ feet. It is obvious that had we assumed an existing opening of 13 feet at midnight as the basis for our calculations, or any figure between 9 and 13 feet, the impossibility of discharging through this gate the quantity of water indicated by the chart (Ex. 13) would have been still more apparent.

As to the allegation that the completion of the opening of gate No. 5, and the resulting discharge of water, "disabled" the power house machinery (Tr. 7), the record shows no such result. It is true that the operators were wading in a foot of water (Tr. 132) but the record further shows that they opened the last gate by electrical power, and then voluntarily disconnected the supply of electricity by shutting down the "house machine." (Tr. 133).

The further allegation that following the alleged disablement of the power house machinery "defendant was unable to close its said flood gates" (Tr. 7) is refuted by the record, which shows that each gate may be closed at any time by gravity, through the use of a magnetic brake capable of being operated by hand (Tr. 124-

125; 48). A picture of such hand-operated brake is in evidence as appellant's Exhibit A-1. Appellees' counsel refrained from asking any of the engineers whether there was any method of closing the gates other than by electrical power. It will be further noted that there is neither allegation nor intimation in the complaint or in the record that the gates could not have been opened mechanically without the use of electrical power.

The charge that "defendant was unable to close its said flood gates" being thus disproved by the record, the correlative charge that they "were forced to remain open" for approximately 24 hours necessarily fails also. Not only were the gates not forced to remain open for 24 hours, or for any other period of time, but as a matter of fact they did not remain open for 24 hours. The record shows that approximately 14 hours after the opening of the last gate was completed at 12:16 A. M., namely, at 2:00 P. M. on December 22, a partial closing of gate No. 5 was then made, and that several changes of gate positions in gate No. 5 were made during the 24 hours of December 22. (See Appendix, Table I, page IV).

The complaint further alleges that during the 24 hours of December 22 appellant discharged approximately 17,000 acre feet of water in addition to the normal flow of the river. (Tr.8). The record shows that during that 24-hour period the elevation of the water of the lake was lowered exactly four feet. (Ex. 13). Assuming that the lake had vertical sides, and that the uniform area was therefore 4000 acres at all stages to which the elevation of the lake was actually lowered, the

maximum discharge that could be effected through a four-foot lowering of the water surface over such an area would be 4000 times 4, or but 16,000 acre feet. However, as the banks of Lake Merwin are sloping and not vertical, as appears from the photograph (Ex. 8), the maximum possible discharge would necessarily be less than 16,000 acre feet. The record further shows that at elevation 235 the area is "around 3900 acres". (Tr. 145). Engineer Roberts calculated that the discharge was 13,600 acre feet during the 24 hours of December 22nd, in excess of the natural flow. Assuming, as the record indicates, that the lowering of the water surface during that day was 4 feet instead of 3.4 feet, as testified by Engineer Roberts (Tr. 177), then his computed excess discharge should be slightly increased, but would still be less than 16,000 acre feet, the actual quantity discharged depending upon the area of the lake throughout the falling elevations.

Thus, out of all this wealth of allegations charging negligent construction of the project and negligent handling of the flood gates and flood waters, we search the record in vain for any suggestion of anything which appellant negligently did, or of anything which appellant negligently failed to do. Three ultimate and undisputed facts are shown by the record, namely: (1) That during the 24 hours of December 22nd the elevation of the water surface of the lake was lowered exactly four feet (Ex. 13); (2) that during that period of time 13,600 acre feet of water in excess of the natural stream flow was discharged through the gates (Tr. 185), though this quantity may vary slightly either way, depending

upon the actual variations in lake area due to the contour of its banks, and to the fact that the lake was in fact lowered 4 feet instead of 3.4 feet as assumed by engineer Roberts in making that computation, and (3) that as the gates were "running full" when all open (Tr. 137), the maximum discharge of 129,000 second feet (Ex. 10) may have represented, at least momentarily, the natural peak stream flow at the time. The occurrence of an *increase in stream flow of 37,600 second feet,* which took place *within a 45-minute period* from midnight to 12:45 A. M. on the 21st, makes it highly probable that this peak of 129,000 second feet which occurred at 12:16 A. M. on December 22nd was caused by a similar rapid rise in the natural stream flow. [See post, p. 83, par. (3)]. No effort was made by appellees to show what part of the peak discharge represented natural stream flow or what part of such peak discharge represented excess, if any, over stream flow at the time of the peak. Appellees contented themselves with showing their computation of the *mean discharge for the day* in excess of stream flow, namely, 13,600 acre feet, or 6800 second feet, based upon a lowering of the lake by 3.4 feet.

In *Brown et al. v. Chicago, B. & Q. R. Co.,* 195 Fed. 1007, (1912; D. C. Nebr.), consolidated actions were brought for damage to crops and for erosion and silting of lands, alleged to have resulted from the defendant's negligence in causing the waters of a stream to overflow plaintiffs' land. The entire opinion is instructive on a number of points involved in the case at bar, but attention is especially directed to the Court's concluding language as follows (at 1012-1013):

> "Summing up the principles applied in these decisions, it may be stated that in an action of this kind it is not sufficient to prove an obstruction of a stream, and that such obstruction contributes to causing an overflow and an injury, but the amount of overflow and damage which is caused by such obstruction must be traced. Ordinarily this requires that a comparison be made by evidence as to what overflow and injury would have existed in the course of nature under similar circumstances if there had been no obstruction, and only for the differences between the results is the one causing the obstruction liable.
>
> "As there was no evidence from which the jury in these cases could have made this comparison, the verdicts were properly instructed for the defendant, and new trials are denied."

It is elementary that negligence is never presumed in an action of this character, but must be proved. Thus, in *Eikland v. Casey,* 290 Fed. 880 (1923; C. C. A. 9th), a flood case, this Court said (at page 882):

> "Liability for damage is not to be assumed without proof of some fault or negligence on the part of the defendants." (Citing numerous authorities).

While the case of *New York Central Railroad Company v. Ambrose,* 280 U. S. 486, 490; 74 L. ed. 562 (1930), involved the alleged negligence of a master toward its servant, the applicable rule in negligence cases is aptly stated as follows (74 L. ed., at 565):

> "In any view of the matter, the respondent (plaintiff), upon whom lay the burden, completely failed to prove that the accident was proximately due to the negligence of the company. It follows that the verdict rests only upon speculation and conjecture, and can not be allowed to stand. (Citing references) * * *

> "It is not sufficient for the employe to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

The applicable principles in actions for damages based upon alleged negligence are too well understood to warrant further citation of authorities on this phase of the case.

In the absence of any testimony as to what appellant should have done or negligently failed to do, the facts shown by the record, to which we have directed attention, neither constitute negligence nor create any implication of negligence.

**2. The evidence conclusively showed that an unprecedented flood caused the damage to plaintiffs' property, regardless of any conduct of the defendant.**

(Assignment of Error No. I; Second Ground Assigned; Tr. 30-31).

**2-A The flood was unprecedented**

The unprecedented magnitude of the flood of De-

cember, 1933, was impressively established by the testimony of the witnesses Calkins and Griswald, who were preeminently qualified to speak on this subject. Mr. Calkins testified that the maximum flood on the Lewis River recorded by the United States Bureau of Geological Survey for the period covered by the records of that government office was a flood of 60,000 second feet at the Amboy recording station (within the area later absorbed by Lake Merwin), which occurred on December 18, 1917 (Tr. 102-103), and that that discharge represented just an *instantaneous* peak. (Tr. 103). The flow at Ariel is normally roughly 10% greater than at Amboy (Tr. 147), so the peak of that flood at Ariel may properly be assumed to have been approximately 66,000 second feet.

But what of the normal stream flow at Ariel, and below, during the disastrous flood of December, 1933? The government's own record (Exhibit 10) shows a *mean daily flow* for the two whole days of December 21 and 22, a 48-hour period, *far in excess* of the brief peak at Amboy of December 18, 1917. The *mean daily flow* for December 21, 1933, was 84,600 second feet, and during that day the flow steadily increased from a minimum of 61,000 second feet at midnight on the 20th to 73,000 second feet at 12:45 A. M. on the morning of the 21st, and, with but brief slight recessions during the day, continued to increase from that already tremendous flow to a flow of 105,000 second feet at 10:00 P. M. (see Appendix, Table I, page IV), and that, notwithstanding that staggering discharge, the water level of the reservoir rose 1.5 feet during the day (see Ex. 13), which

is the equivalent of approximately 6,000 acre feet of storage, or a mean stream flow for that day of an additional 3,000 second feet.

On the 22nd the mean flow for the day was 114,000 second feet (Ex. 10), or a net mean natural flow for the day of 107,200 second feet, after deducting the 6,800 second feet of excess over stream flow which engineer Roberts testified was released from the lake on that day, with an instantaneous peak discharge of 129,000 second feet, approximately twice the instantaneous peak that had ever previously occurred in the known history of the river.

Mr. Griswald, a consulting engineer, testified that he made or directed the making of all of the investigations on the Lewis River up to the time construction of the dam was begun (Tr. 144), and that he had spent half of his time for the eight years between 1921 and 1929 in investigating the condition of the Lewis River. As a part of such investigation he examined the history of the river as to past floods and freshets, examined log drifts and high water marks, interviewed old ranchers along the river—among them elderly men who had been born on the river—and could find no evidence of any prior flood as high as the flood of 1917 (Tr. 146-149), which, in both duration and peak discharge, appears insignificant when compared with the flood of December, 1933. Had appellant offered any defense testimony in this action and endeavored, independently of appellees' testimony, to prove that the December, 1933, flow was unprecedented in the history of the river, it would not have known how to strengthen the testimony now

shown in the record, as we know of no possible testimony more authentic than that elicited from the memory of the old settlers, coupled with the physical evidence disclosed by log drifts left from prior floods, and the evidence disclosed by the government's own records.

In this Court's earlier opinion in *Eikland v. Casey,* 266 Fed. 821 (1920; C. C. A. 9th), it was said (at page 823):

> "The defendants are bound by this testimony which they themselves introduced."

In the instant case appellees called the witnesses who gave this testimony concerning the unprecedented character of this flood, and they are bound by it. Appellees offered no conflicting testimony on this subject and made no effort to impeach or contradict it in any way. The record is convincing that the December, 1933, flood on the Lewis River was one of those "extraordinary floods" or "unexplainable visitations" to which this Court refers in the *Eikland* case just cited.

In *Grant v. Libby, McNeill & Libby,* 160 Wash. 138, at 143, 295 Pac. 139, at page 142 (1931), the Supreme Court of the State of Washington quotes Lord Mansfield's definition of "act of God", as follows:

> " 'By "act of God" is meant a natural necessity, which could not have been occasioned by the intervention of man, but proceeds from physical causes alone, such as violence of the winds or seas, lightning, or other natural accident.' 1 C. J. 1173.
>
> "The term is defined in Black's Law Dictionary as follows:
>
> 'Any misadventure or casualty is said to be caused by the "act of God" when it happens by the

> direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention, and is of such a character that it could not have been prevented or escaped from by any amount of foresight or prudence, or by any reasonable degree of care or diligence, or by the aid of any appliances which the situation of the party might reasonably require him to use.' "

In *Eikland v. Casey,* 266 Fed. 821, at 823 (1920, C. C. A. 9th), this Court quotes from 12 Am. & Eng. Ency. of Law (2d Ed.) 687, as follows:

> " 'An ordinary flood is one, the repetition of which, though at uncertain intervals, might, by the exercise of ordinary diligence in investigating the character and habits of the stream in which it occurs, reasonably have been anticipated. An extraordinary flood is one of those unexplainable visitations whose comings are not foreshadowed by the usual course of nature, and whose magnitude and destructiveness could not have been anticipated or provided against by the exercise of ordinary foresight.' "

While it is true, in the case just cited, this Court said, in substance, that the mere fact that a rainfall exceeded normal expectation did not warrant its classification as an "act of God", the fact remains that, whatever the cause, the flood in the instant case was so far beyond any flood on the Lewis River known to man, either within his records or his memory, or which might reasonably be expected, as to constitute an extraordinary visitation, or an "act of God".

Of course, in the final analysis, the flood's classification as an "act of God", or otherwise, is immaterial.

The real issue, as shown by authorities cited in this brief, is whether appellees' damage was caused wholly by the natural flood flow of the stream, or partly by such natural flood flow and partly by acts or defaults of appellant, within the allegations and proofs, and, if the latter be established, then whether such acts or defaults constituted negligence, having in mind, further, what a reasonably prudent man, informed as to the habits of the stream and taking all factors into consideration, would have done in like circumstances.

An interesting and instructive discussion of what we have just suggested as the real issue in this action will be found in *City of Piqua v. Anna S. Morris et al.,* 98 Ohio St. 42, 120 N. E. 300; 7 A. L. R. 129, at 131 et seq. (1918). The decision emphasizes the point that, even though concurring acts of an individual and of nature produce the damage, the concurring acts of the individual must be wrongful or negligent before he may be held liable for the result.

See also *Brown et al. v. C. B. & Q. R. Co.* 195 Fed. 1007, at 1012 (1912, D. C. Nebr.; cited, ante, at page 57 of this brief).

In *Radburn v. Fir Tree Lumber Co.,* 83 Wash. 643, 644, 145 Pac. 632, 633 (1915), it appeared that the trial court had refused to give the following requested instruction:

> " 'If you find from the evidence in this case that plaintiff's crop was damaged by rain, as well as by any act of the defendant, then and in that event the defendant in this case is not liable for any damages caused to the crop by rain, and you can only allow

plaintiff such an amount of damage as you find, if any, was caused by the defendant.' "

In reversing the judgment of the trial court and granting a new trial the Supreme Court of Washington says (83 Wash. at 644; 145 Pac. at 633):

> "We think this instruction should have been given. It is the law that where a cause attributable to the one charged concurs with a natural or accidental cause, and both contribute to the injury, a party charged shall not be held to answer for more than his share of the wrong or damage done. We think it will require no citation of authority to sustain this proposition."

In *Mulrone v. Marshall,* 35 Mont. 238, at 241, 88 Pac. 797, at 798 (1907), the following instruction was approved:

> " 'You are instructed that when two causes combine to produce an injury, both of which causes are, in their nature, proximate, and both contributing to an injury, the one being a culpable negligent act of the defendant, and the other some occurrence in the nature of an act of God, for which neither party is responsible, then the defendant is liable for such loss as is proximately caused by his one (own) act concurring with the act of God, provided the loss would not have been sustained by the plaintiff, but for such *culpable, negligent* act of the defendant (if there was any such culpable, negligent act).' " (Italics ours).

In commenting upon this instruction the Supreme Court further says (at same page):

> "It seems to us that the jury must have understood that the court was stating a rule of law, and was not attempting to state any fact. They must have understood the instruction to mean that, if they found from the evidence (1) that there were two

> causes which combined to produce the damage, (2) that both of such causes were in their nature proximate, and (3) that one of such causes was the culpable, negligent act of the defendant, and the other an act of God, then the defendant should be held liable for the loss proximately resulting from the two such concurring causes, provided they should further find from the evidence that the loss would not have been sustained but for such culpable, negligent act of the defendant."

A conclusion that the flood in question was not an "act of God" does not carry with it any implication of liability on the part of appellant. As said by this Court in *Eikland v. Casey,* 290 Fed. 880, 882 (C. C. A. 9th, 1923):

> "But the elimination of that question does not compel the conclusion, contended for by plaintiffs, that defendants were liable for the damages caused by the flooding, for there remained the question whether the flooding which caused the damage was attributable to the negligence of the defendants. Nelson v. Casey (C. C. A.) 279 Fed. 100."

**2-B Nature caused the damage to appellees' property**

We revert to the evidence to see whether the damage to appellees' property was caused by the natural flood flow of the river, or was due to the relatively insignificant increase in the natural flow which resulted from appellant's having released from the lake, during December 22nd, 13,600 acre feet of water, or a mean additional flow for that day of 6800 second feet. Pertinent to this inquiry is a consideration of the location of appellees' lands, the character of the soil in reference to its susceptibility to erosion, the quantities of water to

which it was subjected during the early and continuously increasing stages of the flood, and the testimony as to the nature of the damage to their lands, and when and where the damage occurred.

Mr. Grieger bought his Lewis River farm in 1920; he had not previously lived in that community. (Tr. 153). He disclaimed knowledge of what effect prior floods had had on his lands. (Tr. 167).

Prior to the December, 1933, flood the river flowed toward appellees' lands (Tr. 72) but, at their easterly boundary, turned and ran along on three sides of the lands for a distance of approximately three-quarters of a mile. (Tr. 163). Easterly of the Grieger property there was a low place in the lands through which, in freshets, logs would run for a quarter of a mile across the Grieger lands but for a jetty or sheer boom, consisting of a few piling, that had been constructed to turn them down the normal channel. (Tr. 111-112; 120-121). The December, 1933, flood over the Grieger property started at the point of the sheer boom and then came out over their lands (Tr. 168), cutting approximately straight across and through them, as indicated on the pictures (Exhibits 1-7) and on the pencil sketch (Ex. 18).

The soil of Mr. Grieger's river bottom lands was a light silty loam (Tr. 156), brought in by prior floods (Tr. 187), and "bound to be subject to erosion". (Tr. 187). The tortuous bend of the river as it approached Mr. Grieger's lands rendered them especially subject to erosion. (Tr. 195). In the opinion of appellees' engineer,

W. J. Roberts, erosion of the soil on the Grieger place would start "long before" the river attained a flow of 100,000 second feet (Tr. 193), and would continue as the waters rose (Tr. 191); in fact, in his opinion erosion would start when the flow was somewhere around 50,000 second feet and, as the flood increased, erosion would increase, "especially in the tortuous bend" of the river at the point where it left its old channel and went through the Grieger property. (Tr. 194-195). Engineer Roberts further stated that in his opinion erosion would start "pretty early in the flood stage", and that the silty loam would start to erode when the river was flowing at the rate of four or five feet per second. (Tr. 191).

Let us next examine the water conditions on the Grieger lands during the progress of the flood, and note the concurrent discharges at the dam, as shown by Exhibits A-2 and 10, and the concurrent water conditions at other points along the river as disclosed by the testimony. Reference to Table I of the Appendix to this brief will be helpful in this connection, as it shows in convenient form all of the changes in gate positions and the concurrent discharge of water at the dam, to which we will refer. (Note: In examining the log sheet, Ex. A-2, and the compilation from it set forth in Table I of the Appendix to this brief, it should be noted that each day's record begins with "midnight" as the first entry for the day. For example, the "midnight" shown as the first entry for December 10th means the midnight between December 9th and December 10th, and not between the 10th and 11th).

**The record of December 10, 1933.**

On December 10th for a short time "a little water went through" from the sheer boom to Mr. Grieger's place (Tr. 170), and some water backed in over his place on that day but did not stay long. (Tr. 157). On December 10th the peak discharge at Ariel was 61,000 second feet (Ex. A-2, Tr. 127), and the mean flow for that day was 52,000 second feet. (Ex. 10). It kept on raining between the 10th and the 20th. (Tr. 157).

**The record of December 20, 1933.**

Mr. Grieger testified that on December 20th some water backed in on the west side of his lands (Tr. 167) but he did not see whether it came through from the sheer boom on the 20th, as he was not on that part of his farm on that day, but Mr. Grady Phillips, whose farm adjoins Mr. Grieger's property on the east (Tr. 69), testified that it seemed to him that on the 20th the water started over the Grieger pasture land and farm land. (Tr. 70). On December 20th, beginning at midnight of the previous day, the discharge at Ariel was 38,000 second feet. The natural flow of the river steadily increased that entire day, and by 9:30 P. M. on December 20th the discharge was again 61,000 second feet at the dam. (Ex. A-2; Appendix, Table I, page III). The mean discharge at the dam for December 20th was 44,600 second feet. (Ex. 10). At 4:00 P. M. on the 20th the river was very close to the pavement of the main Pacific highway at Woodland (Tr. 60). Between 2:30 P. M. and 9:30 P. M. on the 20th the discharge at the dam had increased from a flow of 50,000 second feet to 61,000 second feet.

(Ex. A-2). At that time the current of the river was very strong. (Tr. 61). Notwithstanding the discharges of water just shown, the elevation of the water surface of the lake rose from elevation 234.5 at 8:00 P. M. on the 20th to elevation 236.1 by midnight (Ex. 13), which was the equivalent of holding back a stream flow of 19,200 second feet during that four-hour period. A further flow of approximately 25,600 second feet was held back between midnight and 12:45 A. M. on December 21st, by letting the lake level rise to elevation 236.5 (Ex. 13), but, notwithstanding such curtailment of stream flow, the spill at the dam increased from a flow of 61,000 second feet at midnight to a flow of 73,000 second feet at 12:45 A. M. on December 21st.

**The record of December 21, 1933.**

On December 21st, the spill at the dam, with minor recessions, increased from a flow of 61,000 at midnight —almost the equal of the 1917 flood—to a flow of 105,000 second feet by 10:00 P. M. Notwithstanding that enormous discharge, the down-river residents were then receiving less than stream flow, for during that 22-hour period the elevation of the lake rose from 236.1 to 237.4. (Note: Under Note (4) at page IV of Table I of the Appendix we have called attention to a clerical error made in the discharge data recorded at 10:00 P. M. on the 21st. We believe this clerical error is obvious, as the results of other gate changes show that the opening of gate No. 5 from 4.6 feet to 9 feet at that time would increase the spill by approximately 5,000 second feet in-

stead of by 500, as indicated in the log sheet entry for 10 P. M. of that day. (See Tr. 129).

The water conditions generally on December 21st are significant. Mr. Grieger testified that the water "came up quite a lot on that day". (Tr. 158). When he came out on the morning of Thursday, the 21st, the water was "maybe five or six feet deep" on his land. (Tr. 169). The spill at the dam varied from 73,000 to 79,000 second feet between 4:15 A. M. and 7:45 A. M. on that day. Mr. Grieger went to town in the morning of the 21st, and when he returned home around noon the water "was then fairly high across the place"; he had no way of judging how high. (Tr. 170). At 2:00 P. M. on the 21st the spill at Ariel was 75,000 second feet. Mr. Grieger did not stay up watching the flood Thursday night, so he admitted he did not know how much wash, if any, occurred on his property that night. Obviously, whether he stayed up or not, the inky blackness of a rainy December night would have precluded him from knowing or ascertaining what erosive changes were occurring to his land under a stream flow which increased from 78,000 second feet at 4:00 P. M. to 105,000 second feet at 10:00 P. M.—a 30% increase in six hours—during all of which time his lands were receiving *less than the natural stream flow,* as during those six hours the water surface of the lake rose from elevation 237.05 at 4:00 P. M. to elevation 237.4 at 10:00 P. M. (Ex. 13), showing a storage during those six hours of 1,400 acre feet, equivalent to a flow at the rate of 700 feet for a 24-hour period, or at the rate of 2800 second feet for that six-hour period.

At the state fish hatchery, located between the dam and the Grieger property, the water which had been below the roadway on December 20th (Tr. 150) was "six to seven feet over the road" at 7:30 in the morning of the 21st. (Tr. 151). At 5:30 that morning the record shows a spill at the dam of 79,000 second feet, and 73,000 at 7:45 A. M. At that time a house located on the lower ground next to the road in the vicinity of the fish hatchery was carried downstream, and the witness Davis followed it to a point about a mile above the Grieger property. At that time three cottonwood trees and other drift were seen floating down the river. (Tr. 151-152).

At the witness Insull's 47½ acre farm near Woodland a three-foot cedar stick, set out by Insull at the front of his house at 5:00 P. M. on the 20th, was submerged when he arose at 4:00 A. M. on the 21st, and his fence was also submerged. At that time he was "drowned by the water" and "could not get out of the house any more"; he "could not see anything, except a terrible stream, and the foam, and the driftwood". (Tr. 60-62). And this under a spill of but 76,000 second feet at the dam at 4:15 A. M. on the 21st!

By 5:00 P. M. on the 21st one of the dikes at Woodland had broken and the lower part of the town was flooded (Tr. 56), and at about 8:00 P. M. the banks of the river were overflowing at Woodland and the witness Jack Wilson stalled his car on the Pacific Highway after he had travelled about 3000 feet from the point where the highway through Woodland turns north toward Tacoma. (Tr. 54-55). The water was then high enough over the highway to get into the motor of a car. (Tr. 56). The

spill at Ariel at 6:30 P. M. on the 21st was 90,000 second feet; and the elevation of the water surface of the lake was still rising.

**The record of December 22, 1933.**

The peak spill of 129,000 second feet occurred at 12:16 A. M. on the morning of December 22nd. During the approximately 14 hours from 12:16 A. M. to 2:00 P. M. on the 22nd the lake elevation lowered from 237.6 to 234.9, or 2.7 feet. For that period of time this is equivalent to an average discharge over the *then average natural stream flow* of only approximately 9250 second feet, the total discharge during that period varying from 129,000 second feet, at the peak, down to 112,600 second feet at 2:00 P. M. At that time gate No. 5 was lowered to a 20 foot opening (Tr. 142), and the spill remained constant at 112,600 second feet from 2:00 P. M. to 6:00 P. M. During those four hours the elevation of the lake was lowered an additional four-tenths of a foot, which is equivalent to an average discharge of 4800 second feet in excess of the then average stream flow, so the natural stream flow during that four-hour period averaged 107,800 second feet. The mean excess over stream flow during the 24 hours of December 22nd was computed by Engineer Roberts to average 6800 second feet (Tr. 177), or *a little less than 6% increase over the natural stream flow.* (Tr. 186).

On the 22nd Mr. Grieger stood on a hill above the water and could see the river cutting out trees on the northeast corner of his land, and farther up could see some of the soil going. (Tr. 158). From 2:00 or 3:00

o'clock on Friday afternoon the river dropped some. Mr. Grieger testified that he couldn't tell much about the wash until Saturday, but as the water went down farther he could see the extent of the wash, and that it had taken out all the soil clear to the gravel and had washed out his fence. His land was covered with driftwood and sand.

The witness Insull testified that the peak of the flood was between 12:00 and 1:00 o'clock on the morning of the 22nd. (Tr. 62).

The witness Jack Wilson testified that he did not observe any rise in the water at Woodland on the 21st after 8:15 in the evening (Tr. 55), but that on the morning of the 22nd the water had filled in the flats, and "went up against the railroad grade and couldn't go any farther", and seemed to be about three feet higher than when he had seen it the night before.

The witness Frank Miles testified that he had made a mark on an "old fashioned cottonwood tree" at the time of the 1917 flood (Tr. 111, 119). The 1933 flood left a mark on that tree which was seven feet higher than the mark he recorded in the 1917 flood. (Tr. 118).

Mr. Calkins, the engineer of the United States Bureau of Geological Survey at Tacoma, testified that the recording mechanism of the federal government's recording station below the dam "was submerged by several feet, and the house itself was submerged", so that the record of that station on and after December 18th had to be estimated. (Ex. 10; Tr. 100, 103). The government also maintained a gauging station just below the mouth of Swift Creek, farther up the river than the

upper end of Lake Merwin, and consequently wholly unaffected by any operation of the gates or by any control exercised over the waters of the lake. At that gauging station "the banks were washed out and the stilling well and part of the house were filled with sand".

The submergence and disablement of the government's own recording stations, *both above and below the lake,* are of striking significance, and indicate that in the construction of these stations the government itself never anticipated that any flood would put them out of service, for it is obvious that unless they were constructed of a height and character adequate to record the stream flow at all times they would fail of their purpose. It will be noted that the government's down-river station properly recorded the flow of the river on December 10th (Ex. 10), although the discharge on that date nearly equalled that of the 1917 flood.

Having in mind the testimony of engineer Roberts that erosion of appellees' lands would begin with a flood of somewhere around 50,000 second feet, and his further statement that erosion would start "pretty early in the flood stage"; the recorded fact that on December 10th the mean flow was 52,600 second feet and the peak flow 61,000 second feet; that on December 20th the flood increased from 38,000 second feet at the beginning of the 24 hours to 61,000 second feet at 9:30 P. M., with 19,200 second feet more of the natural flow then being held back at the dam; that on December 21st the flood rose from 61,000 second feet at the beginning of the 24 hours to 73,000 second feet in 45 minutes, with 25,600 second feet

more of the natural flow then being held back at the dam, and to 105,000 second feet at 10 P. M. on the 21st, with the natural flow still causing the water level to rise behind the dam, can any man reasonably infer that the relatively insignificant quantity of water—less than 6% of the natural flow—by which the natural flow was augmented by appellant on December 22nd would have done measurable damage to appellees' lands that would not have been caused by the natural flow of the river if allowed to run unimpeded through the dam throughout the four or five days of maximum flow? The record shows conclusively that no such inference is possible.

### 3. The evidence affirmatively showed reasonable care by the defendant

(Assignment of Error No. I; Third Ground Assigned; Tr. 30-31)

The standard of care required of those who impound the waters of a stream has been defined by the Supreme Court of the State of Washington in the case of *Anderson v. Rucker Bros.,* 107 Wash. 595, 183 Pac. 70, (1919), affirmed on rehearing (107 Wash. at 604; 186 Pac. 293), wherein the Court, after citing the ancient rule in *Fletcher v. Rylands,* L. R. 1 Exch. 265, says (at 107 Wash. 598; 183 Pac., at 72):

> "But the more recent and, unquestionably, the greater weight of authority holds to a less strict and, we believe, a much more just rule of liability, and one which, while properly protecting the rights of others, encourages business development. That rule is that one who, by means of a dam, impounds the water of a stream, is required to exercise such rea-

sonable care and caution in the construction, maintenance, and operation of the dam as a reasonably careful and prudent man, who was acquainted with the nature and habits of the stream, the features of the surrounding country, the snow and rain falls, and other conditions likely to cause freshets, would exercise under like circumstances. This rule would cover the stream not only in its ordinary and usual condition as to water, but also when in such unusual and extraordinary flood and freshet as such careful and prudent man would reasonably expect; but the dam owner would not be negligent in failing to provide against unprecedented floods or freshets or act of God." (Citing numerous cases).

In the same case, on rehearing, the Court says (107 Wash. at 604; 186 Pac., at 294):

"Generally speaking, there are two chief questions involved in a case of this character. The first is, whether the dam owner must construct and maintain his dam entirely at his own peril, and as an insurer against damage or whether he will be excused from damages caused by floods which he could not reasonably have anticipated, and if the latter be the correct doctrine, then the care required of such dam owner to anticipate freshets and flood waters; and, secondly, whether, as to all floods and conditions which he is required to anticipate, he must maintain his dam at his peril and as an insurer, or will reasonable care be the measure of his duty? In our former opinion we meant to deal only with the first proposition mentioned. It was not necessary to a decision of the case that we should deal with the second proposition above mentioned, because the trial court had instructed the jury that defendant was bound to maintain his dam so that the same would withstand, 'not only the usual and ordinary freshets, but must also be sufficient to withstand such extraordinary freshets as an ordinarily pru-

dent person would reasonably expect to occur.' In other words, the trial court instructed the jury on the theory that the dam owner would be liable, regardless of the question of care or negligence, for damage resulting from the breaking of his dam, as the result of such floods as a reasonably prudent man would be required to anticipate.

"This instruction was certainly as favorable to the appellant as he could have asked because it eliminated from the case the question of the negligence or lack of negligence of the defendant, and imposed upon it the duties of an insurer. We wish to say, however, that in the departmental opinion we did not mean to, nor do we now, either approve or condemn the instruction given by the trial court; we only hold that it was as favorable to the appellant as any view of the law would justify, and therefore he is not in position to complain.

"On the first above mentioned question we intended to hold, and we now hold, that the dam builder and owner does not build and maintain the dam at his absolute peril and is not an insurer, but that, on the contrary, he will be excused by acts of God, or floods which he could not have anticipated, and that he would be required to anticipate only such floods as a reasonably prudent man, acquainted with all of the surrounding circumstances, would anticipate."

Furthermore, as said in *Jones v. California Development Co.*, 173 Cal. 565, 574, 160 Pac. 823, 827 (1916):

"The underlying principle governing the decision of all these cases which deal with extraordinary water conditions, whether created by the ocean or by unexpected and unprecedented floods, is that in such stress the landowner may use every reasonable precaution to avert injury from his land, and whether or not his conduct be reasonable will be

> determined by existing conditions and not by after consequences; so that if the acts of the landowner be, in the light of the existing circumstances, not unreasonable, he will not be held liable for consequent damage which by these reasonable acts may be inflicted upon another landowner. It follows herefrom that the acts of protection themselves may differ in kind and character, but however they may differ, the test of the doer's legal liability is: Was the particular act which he did reasonable in view of the existing circumstances?"

The case last cited is unique and interesting, in that the acts of the appellant causing the damage therein complained of consisted in so controlling the waters of the Colorado River, and in withdrawing them so rapidly from the lands of the appellees that their lands were eroded and gulleys formed in them.

The principle of law enunciated in the case just cited was followed by the Supreme Court of California in *Weinberg Co. v. Bixby et al.*, 185 Cal. 87, 96; 196 Pac. 25, 33 (1921).

In the light of these applicable principles of law, let us examine the conduct of the operators of the dam during the flood, as shown in the record, to see if it measured up to the standard required by the authorities cited.

The chief operator, David J. Shore, testified that when the stream reached a peak of 61,000 second feet on December 10th he "began to observe conditions in Woodland", and that "when anything happens that is above normal operation, the operators are naturally anxious about what is happening". (Tr. 137). That discharge of 61,000 feet, it will be recalled, slightly exceeded the

Amboy peak of 1917, but was not quite so high as the resulting assumed peak of 66,000 second feet at Ariel (Tr. 147), yet high enough to create concern in the minds of the operators of the Ariel dam. As said by Mr. Shore:

> "We thought of Woodland at that time. I did not go to Woodland at that time to see what was happening down there, but we got reports from Woodland at that time. The reports came from people living in Woodland. If the water remained at 61, [61,000 second feet] why, there wouldn't be any danger in Woodland. I don't just remember just who was giving me these reports. There was plenty of people calling up, asking us water conditions, at all times,—what we think of the rain, and whether we are going to have more spill, or what have you. (Tr. 137-138) * * *
>
> "It is correct that I stated here on my cross-examination that in my raising the height of the water in the dam, I had these people below in mind; I meant the people in Woodland; those were the ones I was in touch with. As to whether I was referring to Mr. or Mrs. Grieger,—it meant the same thing to me. It was the people below the power house. The agitation that was on, or the evidence of panic that I saw, was from people in Woodland, twelve miles away. (Tr. 139) * * *
>
> "As to whether the reason for impounding the water was not because I had the people in mind but because I had the safety of the dam in mind,—you could run the water twenty foot over the top of that dam, and that dam would still be there. The safety factor of that dam is so far above the actual pressure of the water up to 235, that it is about 5 to 1." (Tr. 139).

The peak of December 10th came and passed, without apparent damage to anyone, but at midnight on the

20th that peak was again not only reached but exceeded, and within a forty-five minute period reached a record-breaking flow of 73,000 second feet at 12:45 A. M. on the 21st.

On the afternoon and evening of December 20th the water had increased from a flow of 50,000 second feet at 2:30 P. M. to 61,000 by 9:30 P. M., although in that interim the lake elevation had risen 1.1 feet (Appendix, Table I, page III), equivalent to a stream flow of over 7500 second feet then held back. At that time Mr. Shore was at Woodland. (Tr. 130). The water was then close to the main street in Woodland, and the city fire apparatus was being moved out. "The people were panicky, and expecting higher water". (Tr. 130-131). After conferring with the Mayor of Woodland, the manager of the telephone company being also present (Tr. 143), Mr. Shore "got in communication with the plant over the telephone, and instructed them to let the water come up a foot". (Tr. 131).

Mr. Shore then returned to Ariel and kept in telephone communication with Woodland. As Mr. Shore expressed it:

> "I conferred back and forth about the water condition there and the water condition there at Ariel. I advised them of my condition and they advised me of theirs. I had the thought of the people in mind,—was trying to cooperate with them." (Tr. 131).

It is of course apparent that all persons whose lands were along the river below the dam, including appellees, as well as those living at Woodland, would all be successively affected by the flood, their individual experi-

ences with the flood waters varying only in degree, depending upon the contour and elevation of their respective lands, their proximity to the river, and the slope and resulting velocity of the river as it ran through or near their lands. It is equally apparent that of all property along the river, appellant's own lands and property were first to be affected by the flood, and most acutely, on account of the narrowness of the river channel at and immediately below the dam, as shown in the photograph, Exhibit 8.

In judging the conduct of the operators of the dam during the flood, the record shows that Mr. Shore had been superintendent of the plant during the entire period of its operation. (Tr. 77). He had become familiar with the normal actions of the river and had of course noted its quick responsiveness to heavy rain and to other climatic conditions, as well as its tendency to rise at times with great rapidity. Thus, reference to the record (Ex. A-2; Appendix, Table I) will show the following significant action of the river during December, 1933:

> (1) An increase from a flow of 17,000 second feet at midnight of December 8th to 61,000 second feet at 12:30 A. M. on December 10th, a 24½ hour period,—the greatest flow in the history of the plant up to that date—followed by a drop in flow to 38,000 second feet at midnight on the 10th.
>
> (2) An increase from a flow of 50,000 second feet at 2:30 P. M. on December 20th to 61,000 second feet at 9:30 P. M., with a concurrent rise in lake elevation of one-tenth of a foot, equivalent to

an aggregate increase in stream flow of 11,800 second feet in that six-hour period.

(3) An increase from a flow of 61,000 second feet at midnight of December 20th to 73,000 second feet at 12:45 A. M. on December 21st—a 45 minute period—with a concurrent rise in lake elevation of four-tenths of a foot, *equivalent to an aggregate increase in stream flow of 37,600 second feet within that forty-five minute period.* A significant feature of this extraordinarily rapid rise in the natural stream flow is that notwithstanding the fact that the operators released an additional 12,000 second feet of stream flow at 12:45 A. M., thus creating a spill of 73,000 second feet at that hour, the lake elevation continued to rise from elevation 236.5 at 12:45 A.M. to elevation 236.75 at 4:15 A.M. (Appendix, Table I, page IV).

An examination of Exhibit A-2 (Appendix, Table I) further discloses the frequent tendency of the river flow to increase in the evening and along toward midnight, thereby reflecting the effect of melting snow during the warmer hours of the day.

After Mr. Shore had testified that he partially closed gate No. 5 at 2:00 P. M. on December 22 (Tr. 86) appellees' counsel, apparently undertaking retrospectively to judge and criticize Mr. Shore's not having sooner closed any of the gates, asked him why he hadn't closed them by hand, to which Mr. Shore replied:

> "As to why I didn't close them by hand,—well, the rain we were having that day; we got three and a half inches of rain, and in our judgment at that

time with that rainfall,—our judgment was prompted by other times from the first of the month on where we would have a freshet, and probably drop; we had no reason to think we would not go further than we had. That is the reason we did not drop them. We could have dropped them at any time." (Tr. 87).

The contention that the gates would have been sooner closed had electrical power been available prior to 2:00 P.M. on the 22nd, as implied in counsel's query as to why Mr. Shore "didn't close them by hand", is refuted by the fact that when electrical power became available at 2:00 P.M., and No. 5 gate was then partially lowered, it was not lowered sufficiently to prevent the discharge from continuing slightly to exceed the stream flow then coming into the lake, as evidenced by the further drop in lake elevation from 234.9 at 2:00 P. M. to 234.85 at 3:00 P. M. shown by Exhibit 13 (Appendix, Table I, page IV), and is further refuted by the additional slight drop in lake elevation shown by the same record to have been permitted to continue and to have continued from 3:00 P.M. on December 22nd until 1:00 A.M. on December 23rd, notwithstanding the fact that additional changes in the position of gate No. 5 were made between such stated hours. (Ex. 13; Appendix, Table I, page IV).

That Mr. Shore was striving only to cooperate with the people along the river below the dam, including those at Woodland, is shown by the testimony wherein he tells of his constant contact by telephone with the people at Woodland, and of their interchange of information concerning their respective local water conditions. (Tr.

131). How could he fail to appreciate their situation, knowing as he did that at 7:55 P. M. on Thursday evening, December 21st, the Town of Woodland "was pretty thoroughly flooded" (Tr. 56), when 85,000 to 90,000 second feet, *less than the then natural flow of the river,* was being released through the gates, and the elevation of the waters of the lake was still rising? (Appendix, Table I, page IV). The *mean natural stream flow* for the entire 24 hours of December 21st was 84,600 second feet (Ex. 10), and during that day the lake elevation rose from 236.1 to 237.6 at midnight.

When Mr. Shore testified that he permitted the waters of the lake to rise to elevation 237 on the 21st, and was asked by appellees' counsel if he could have released the water before then—and was impliedly criticised for not having done so—Mr. Shore replied:

> "As to whether I could have let it out before then—well, if I could outguess the elements, I probably could have. It was just a case of opening the gates. We could open the gates, but our normal head is 235; that is our working head, the head that we bought the machines for. As to whether we could have maintained it at 235 right along if we had wanted to, if we had opened the gates up—we could not have on the night of the 21st. We never at any other time had all the gates wide open. The increase from 235 to 237 occurred practically the last two days. During that period of time we could have let the water out by opening up the gates; but I didn't. That was a matter of my decision." (Tr. 135).

It is obvious that when the gates were all open and "going clear full" at elevation 237, as testified to (Tr.

137), no power of man could have maintained the lake at elevation 235.

As pointed out by authorities already cited (ante, pp. 76 to 79), the operator's decision in the matter of proper and prudent gate operation is to be judged by conditions *as they existed at the time.* In view of a current rainfall of 3.50 inches on the 21st (Tr. 87), equally hard rain on part of the 22nd (Tr. 131), the appalling increase in stream flow of 37,600 second feet recorded during the 45-minute period from midnight to 12:45 A. M. on the 21st, and the demonstrated tendency of the river to attain its greatest flow at night, why should not Mr. Shore, or any other intelligent operator, in the exercise of sound judgment, reach the conclusion that on the night of the 22nd, *the peak would be still greater than it had been on the night of the 21st?* As Mr. Shore expressed it: "We had no reason to think we would not go further than we had." (Tr. 87). Based upon existing conditions and the experiences just undergone, there was every sound reason to believe that the peak on the night of the 22nd would be still greater. All known records of stream flow had by that time been far exceeded. And if such greater peak was coming, what could the operators do to anticipate and minimize its damage to all property below the dam? Obviously nothing, except to reduce the existing elevation of the lake and thus to provide a certain amount of temporary storage in the hope that the peak would not outlast the storage capacity thus created. That was the sole purpose in letting the lake elevation rise 3.3 feet during the 48 hours preceding December 22nd. The only reason this strategy failed of

its purpose was because the duration of the flood continued and its severity increased beyond all expectations.

The expected greater peak on the night of the 22nd did not materialize. Whether due to stopping of the rain, cooler weather, or because the snow on the lower reaches of the river had melted and already run off, or to some other cause or causes, is not shown in the testimony. But Mr. Shore disclaimed ability to "outguess the elements" (Tr. 135), and, like any other operator, could only form his decisions from conditions as they appeared at the time. As soon as conditions improved during the 22nd, so that it seemed safe to do so, a gradual gate closing was started. That also was a matter for the chief operator's decision.

It again seems strange that no engineer, or any other witness, was asked by appellees' counsel what he or any qualified engineer or operator would have done differently in like circumstances; yet no such question was asked and no testimony given by any witness except Mr. Shore himself. As the result of this condition of the record, the verdict, quite aside from other inherent defects to which we will next call attention, stands as the condemnatory decision of the jury, rendered in retrospective contemplation of what Mr. Shore had done in the exercise of his judgment at the time, and rendered without a scintilla of evidence as to what he or anyone else should have done differently, unless, perchance, his conduct is to be condemned for his inability to outguess the elements.

A graphic picture of the conditions which confronted the operators on the night of the 21st and early morning hours of the 22nd, expressed in homely but impressive language, appears at page 132 of the Transcript of Record.

In *Radburn v. Fir Tree Lumber Co.*, 83 Wash. 643, at 646; 145 Pac. 632, at 633 (1915), it is said:

> "* * *; but the law does not put upon men who are engaged in the prosecution of rightful enterprises the duty of anticipating that which is unprecedented, or which has not occurred within the memory of man."

In *Crawford v. Cobbs & Mitchell Co.*, 121 Or. 628, at 642; 257 Pac. 16, at 18 (1927), on rehearing, the following instructions were quoted and approved as correctly stating the law:

> " 'Defendant was under no obligation to impound or hold behind its dam any water naturally flowing into the millpond on November 20, 1921, or at any other time. Such water would be the natural flow of the stream at the time, regardless of whether the stream was at flood stage, and defendant could permit it to flow past the defendant's dam without liability for any damage caused thereby.
>
> " 'If you find from a consideration of all the evidence that the amount of water in defendant's reservoir was not reduced on November 20, 1921, and prior to the damage claimed by plaintiff, but if the level of the water in the millpond remained the same, or increased during the day, the plaintiff cannot recover. It would be immaterial whether the water passing defendant's dam went over the dam or through the headgate which defendant opened.
>
> " 'If you find that the defendant released from its millpond an amount of water greater than was

flowing into said millpond, but you further find that a man of ordinary prudence would have done the same thing under like circumstances, your verdict would be for the defendant.' "

See also *Central Trust Company of New York v. Wabash, St. L. & P. R. Co.*, 57 Fed. 441, at 446-447 (C. C., Dist. Indiana; 1893).

**4. The verdict was purely speculative and without basis for computation.**

(Assignment of Error No. 1; Fourth Ground Assigned; Tr. 30-31)

In assigning as one of the grounds of appellant's motion for a non-suit "that any verdict rendered on the evidence would be purely speculative and without basis for computation", it was not implied, nor do we now imply, that this objection to the verdict runs only to difficulties in computing it, or to any inaccuracy in the method of its computation. Our objection is that there is *no evidence* to support the verdict in the amount awarded, or in any amount; that the verdict is inherently unsound, and could not properly have been rendered in the amount awarded, or in any amount, except upon certain assumptions, as to which there is no evidence in the record.

The authorities hereinafter cited announce the rule that before a verdict in favor of appellees could properly be rendered not only must negligence be proven as alleged, but certain further essential facts must be established.

**4-A It was appellees' duty to prove what part of their damage was caused by nature, and what part, if any, by any negligent act or default of appellant.**

In *Radburn v. Fir Tree Lumber Co.,* 83 Wash. 643; 145 Pac. 632 (1915), the respondent recovered judgment against the Lumber Company for damages to his lands resulting from backwater caused by the obstruction of a stream. Error was assigned in the trial court's refusal to give the following instruction (83 Wash., at 644; 145 Pac. at 633):

> " 'If you find from the evidence in this case that plaintiff's crop was damaged by rain, as well as by any act of the defendant, then and in that event the defendant in this case is not liable for any damages caused to the crop by rain, and you can only allow plaintiff such an amount of damage as you find, if any, was caused by the defendant.' "

In reversing the judgment the court says (at same page):

> "We think this instruction should have been given. It is the law that where a cause attributable to the one charged concurs with a natural or accidental cause, and both contribute to the injury, a party charged shall not be held to answer for more than his share of the wrong or damage done. We think it will require no citation of authority to sustain this proposition."

See *Brown v. C. B. & Q. R. Co.,* 195 Fed. 1007, at 1011-1012; (D. C. Nebr. 1912; ante, p. 57).

*Georgia Ry. & P. Co. v. Johns,* 20 Ga. App., 780; 93 S. E. 521 (1917) involved an action by a land owner against a power company for alleged flooding. It was claimed that certain gates were opened and a great

quantity of water discharged, overflowing plaintiff's land and causing damage. The appeal was from a judgment in favor of plaintiff. The Supreme Court of Georgia held that there was not sufficient evidence to go to the jury. The pertinent part of the opinion, so far as the case at bar is concerned, is found at 20 Ga. App., at 785; 93 S. E., at page 523:

> "Let us grant, however, what the evidence does not show, and say, for the sake of argument, that the total effect of the two dams was to increase slightly the depth of the overflow on the plaintiff's farm. Does it follow that the plaintiff's damage would have been any less if the depth of that overflow had been 14 feet, or only 12 or 13 feet, instead of approximately 15 feet, as the evidence shows that it actually was? We think the difference would be a trifle, if any; and certainly there is no evidence in the record to show that such a difference in the depth of the overflow might have made a material difference in the extent of the damage done. For these reasons, it must be held that neither the defendant's conduct nor its property, nor both together, constituted the proximate cause of the plaintiff's injuries."

**4-B There is no competent evidence of the extent to which any water discharged through the gates in excess of the concurrent natural stream flow increased either the depth or the velocity of the water flowing over appellees' lands, or of the damage, if any, caused by either or both such factors.**

Irrespective of any question of negligence, the record contains no competent evidence as to what additional depth of water was resultingly imposed upon appellees' lands by the relatively insignificant quantity of water

discharged from the lake during the time that the discharge at the dam was exceeding the natural stream flow; nor does the record contain any evidence as to what part of appellees' damage, if any, was caused by such discharge in excess of the concurrent natural stream flow. The only testimony with reference to *the additional quantity* of water thus imposed upon appellees' lands was that of Engineer Roberts, who testified that the *mean quantity* released from the lake during December 22nd was an average flow of 6800 second feet in excess of the natural stream flow on that date, and that such 6800 second feet created an excess over the natural stream flow *of a little less than* 6%; and in testifying as to *what additional depth* upon appellees' lands such additional 6% in the quantity of water discharged and flowing over them would create, Mr. Roberts stated that if there were 6 feet, or 72 inches of water, then flowing over the Grieger place, the result of such 6% increase in quantity would be to create an additional depth of water on the Grieger lands of "a trifle over 4 inches". (Tr. 186). It will be recalled that Mr. Grieger testified that on the morning of Thursday, December 21, he observed that the water was "maybe five or six feet deep" on his lands. (Tr. 169). During that morning the *less than natural flow* released from the lake varied from 73,000 to 79,000 second feet. If at that discharge the water was 5 or 6 feet deep on the Grieger lands, what was its depth at the time of the successively greater discharges of 85,000, 90,000, 100,000 and 105,000, *during all of which times the Grieger lands were being subjected to less than the natural flow of the stream;* and what was

the depth of water on those lands as the flow of the stream progressively increased from 105,000 second feet to its peak of 129,000; and, at the time of that peak, how many inches of the water then flowing across appellees' lands represented discharge from the lake in excess of the concurrent natural flow? There is no testimony as to the depth of the water on the Grieger lands at the time one of the "big cottonwood trees * * * was washed up on top of two apple trees there, and was resting there after the flood" (Tr. 159), or as to how many inches of the water that could produce that situation were the result of appellant's having released "a little less than 6%", or any other percentage, in excess of the average stream flow on the 22nd, or in excess of the natural stream flow at any hour on that day.

One of the allegations of the complaint was that the damage to appellees' lands was caused by an *increase in the velocity* of the water released from the lake, as well as by an increase in its quantity. There is no testimony whatever as to what the velocity of the water would be across appellees' lands, either at the peak of the flood or at any other rate of discharge from the lake. Engineer Roberts testified that:

> "I do not know the difference in elevations in the base of the spillway at the Ariel dam and the line of Grieger's place where the river first gets to it. To figure any velocity of water you have to know the head, the course of the stream, the elevation of the bed of the stream, the width and condition of the banks; * * * To compute it [the velocity] you have to know the slope. To estimate the quantity of water flowing you have to know the slope. If you don't know the drop, in other words the slope,

you can't figure the velocity. The slope is the difference in the elevations at the two points, divided by the horizontal distance. I have not made any such measurements or computations in this case." (Tr. 184-185).

He further testified as follows:

"I do not know how many second feet the river would have to flow to overflow the bank at the Grieger place; I cannot compute it without more data." (Tr. 189-190).

Mr. Roberts then testified that had he been directed to prepare himself on this subject he could have done so, but that it would have taken considerable study to do it. (Tr. 190).

In conclusion on this subject, under re-direct examination by appellees' counsel, Mr. Roberts further testified as follows:

"I would say that the raising of the water to the elevation of 237 feet back of the dam, and allowing it to drop between three and four feet in elevation in a period of twenty-four hours, would have *some effect* on Mr. Grieger's land. I never measured the channel below the dam; I never had occasion to survey it, either for depth or for width. I don't know the sectional area of that channel. As to whether I would be able to testify with any degree of accuracy at all without having possession of those figures, as to how much water it would take to overflow the banks, or to wash away Mr. Grieger's land—*you couldn't do it without some computation that covered the question you asked; in fact, I wouldn't know anything about it at all without those figures.*" (Tr. 196-197; italics ours).

In other words, Mr. Roberts admitted that he lacked *all essential data* for reaching any informed conclusion,

either as to the velocity or as to the quantity of the water which flowed across appellees' lands *at any stage of the flood;* but notwithstanding such lack of indispensable evidence the jury was nevertheless allowed to speculate and to guess, not only as to whether the appellant was responsible for any damage to the Grieger lands but as to the quantum of such damage, and as to how much, if anything, should be awarded to appellees for such damage, if, of course, it were also proven that appellant had been in any respect negligent. Mr. Grieger testified that he did not have any survey or measurements made as to the actual quantity of his land that had been washed over, and testified: "I didn't have the means, and so forth, to make that"; but later he admitted that after the flood he had bought 88½ acres of land in the river bottom adjoining his existing holdings, for which he paid $1,550.00.

In *The Mayor, Alderman and Commonalty of The City of New York v. Franklin Ransom et al.,* 23 How. (U. S.) 487, at 488; 16 L. ed. 515 (1860), the Supreme Court of the United States says (16 L. ed. at 515):

> "Where a plaintiff is allowed to recover only 'actual damages,' he is bound to furnish evidence by which the jury may assess them. * * * He cannot call on a jury to guess out his case without evidence. Actual damages must be calculated, not imagined, and an arithmetical calculation cannot be made without certain *data* on which to make it."

In *Pennsylvania Railroad Company v. Chamberlain,* 288 U. S. 333, at 344; 77 L. ed. 819 (1933), from which we quote on another point at page 98 of this brief, it is held (77 L. ed. at 825) that a verdict must not rest

"upon mere speculation and conjecture". (Citing numerous cases).

In *Midland Valley R. Co. v. Fulgham,* 181 Fed. 91 (C. C. A. 8th; 1910), it is said (at page 95):

> "Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action in this case of the alleged defect in the lift pin lever and the coupler is indispensable to the maintenance of a verdict sustaining it." (Citing cases).

*United States v. Kerr,* 61 Fed. (2d) 800, 803 (C. C. A. 9th, 1932), involved a claim for total and permanent disability benefits under a war risk policy. In reversing a judgment for the plaintiff, this Court says:

> "Totality and permanency are essential elements and must be established by substantial evidence and cannot be found by speculation, surmise or conjecture. The evidence must show something of relevant consequence, and not be vague, uncertain, incompetent, or irrelevant, not carrying the quality of proof, or having fitness to produce conviction, and be such that reasonable persons may fairly differ as to whether it proves the fact in issue. * * * Some substantial evidence must be presented to carry the case to the jury."

In *Wheelock et al. v. Freiwald,* 66 Fed. (2d) 694, at 698 (C. C. A. 8th; 1933), it was said:

> "No. 4. A verdict cannot be permitted to stand, which rests upon conjecture, surmise, or speculation, but plaintiff must produce substantial affirmative proof that the negligence of the carrier caused the injury, and, 'where proven facts give equal support to each of two inconsistent inferences; in

which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover.' " (Citing numerous decisions of the Supreme Court of the United States).

In *Huffine v. Alvin Investment Company,* 126 Wash. 490, at 492; 218 Pac. 194, at 195 (1923), it is said:

> "No necessity exists for a minute recapitulation of the evidence to show how conjecture meets counter conjecture, and how surmise must be substituted for proof in order to sustain the verdict. Nor is a review of the authorities illuminating, as the principle of law involved is of the utmost simplicity, and that is that verdicts must rest on evidence and not on guesswork."

In *Crawford v. Cobbs & Mitchell Co.,* 121 Or. 628, at 635, 253 Pac. 3, at 5 (1927), the Court says:

> "Of course, in cases where it is just as probable, on the face of it, that one cause was as likely to have produced the injury as another, there can be no verdict based upon an exact balance of probabilities, which would reduce the verdict to mere guesswork or chance, * * *".

See also:

*New York Central Railroad Company v. Antonia Ambrose, Admx.,* 280 U. S. 486 at 491; 74 L. ed. 562, 565 (1930), cited at page 58 of this brief.

**5. The motion for nonsuit presented the same matters for the consideration of the Court as would a motion for a directed verdict, and the evidence should have been but was apparently not so judged by the trial**

court. There was not a scintilla of evidence to support the verdict.

This point of argument is addressed generally to all four grounds assigned in support of the motion for nonsuit. (Assignment of Error No. I; Tr. 30-31).

In *Maryland Casualty Company v. Millie R. Jones,* 279 U. S. 792, 795; 73 L. ed. 960, at 963 (1929), it is said:

> "The motion for nonsuit—which corresponds to a motion for a directed verdict—presented the question whether the evidence, with every inference of fact that might be drawn from it in favor of the plaintiff, was sufficient in matter of law to sustain a judgment. See Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 38; 35 L. ed. 55, 60, 11 Sup. Ct. Rep. 478."

We have heretofore cited the case of *Pennsylvania Railroad Company v. Chamberlain,* 288 U. S. 333-344; 77 L. ed. 819-825 (1933), ante page 95, but respectfully urge the Court to read the entire opinion and to compare the evidence in that case with the evidence in the case at bar, bearing in mind that, as said by the Supreme Court in that opinion:

> "The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned." (288 U. S. at 343; 77 L. ed. at 825).

In the instant case there is not even a scintilla of evidence in support of the several charges of negligence. The most that could be said in criticism of the conduct of the operators of the dam, and that unjustifiably, is that, *when viewed in retrospect,* it was unnecessary for them to have discharged any quantity of water in ex-

cess of the concurrent natural stream flow, for the reason that subsequent developments, which obviously could not be predetermined, proved that the river did not attain a still higher peak on the night of December 22nd and therefore their precautions and efforts to secure some temporary storage in preparation for such expected higher peak ultimately proved to have been unnecessary, and that their judgment was therefore unwisely exercised. But that is a very different thing from a *negligent* act or default.

In referring to a case in the State of New York the Supreme Court of the United States, in *The Union Pacific Railway Company v. McDonald,* 152 U. S. 262, 281; 38 L. ed. 434, at 443-446 (1894), says:

> "And so, as declared by the same court, persons in sudden emergencies, and called to act under peculiar circumstances, are not held to the exercise of the same degree of caution as in other cases. * * * Even in the case of an employe of a railroad company, claiming to have been injured as the result of the company's negligence, this court has said that in determining whether he has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might be expected, regard must always be had to the exigencies of his position, *indeed to all the circumstances of the particular occasion.*" (Italics ours).

See also *Vascacillas v. Southern Pacific Company,* 247 Fed. 8, at 12, (C. C. A. 9th, 1918).

Our reference to the two authorities last cited does not imply the slightest intimation that the conduct of the operators of the dam was negligent or that their conduct indicated any lack of caution for the safety of

persons or property. The citation of these authorities is only in further support of our contention that the operators' conduct should be judged in the light of the emergency in which they found themselves during an unprecedented flood, and in the light of the circumstances vividly portrayed at pages 131 to 134 of the Transcript of Record.

It is no answer to the testimony to say that the witnesses called by appellees (Schmidt, Tr. 40; Shore, Tr. 77, 124) were employees of appellant, or that Lyman Griswald (Tr. 144) had been appellant's consulting engineer on the project, and therefore their testimony should be disregarded. As said by the Supreme Court of the United States in *Chesapeake & Ohio Railway Company v. Martin,* 283 U. S. 209, at 216; 75 L. ed. 983, at 987 (1931):

> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt."

We cite the following sections of Remington's Revised Statutes of Washington, as involving the same underlying thought, as follows:

> "Sec. 1225. *Examination of adverse party as witness.* A party to an action or proceeding may be examined as a witness, at the instance of the adverse party, or of one of several adverse parties, and for that purpose may be compelled in the same manner and subject to the same rules of examina-

tion as any other witness to testify at the trial, or he may be examined on a commission."

"Sec. 1229. *Testimony not conclusive.* The testimony of a party, upon examination at the trial, or by deposition, or upon interrogatories filed, may be rebutted by adverse testimony."

Assuming, for the sake of the argument, but not conceding, that any employee of one party (such as Shore and Schmidt in the instant case), or any person who, by reason of past employment by one of the parties, might reasonably be assumed to be such party's witness (Lyman Griswald in the instant case), may be treated as "adverse" and his testimony therefore rebutted or impeached, the fact remains that in the case at bar none of the testimony of any of these three witnesses was rebutted or impeached in any respect, nor was any rebuttal or impeachment of any of their testimony attempted.

In our view of the law and the evidence the appellees signally failed to support any of the charges of negligence by them alleged, and the trial court erred in denying the motion for nonsuit.

## ASSIGNMENT OF ERROR NO. II

**The Court erred in entering judgment on the verdict herein, in that said verdict was against law and unsupported by the evidence. (Tr. 30-31).**

The argument advanced and the authorities already cited in reference to the error of the trial court in deny-

ing appellant's motion for nonsuit would seem to render unnecessary further discussion of the error in entering judgment on the verdict. We accordingly urge that what we have said in relation to the motion for nonsuit and of the error in denying it be considered by this Court as addressed with equal force to the error in entering judgment on the verdict. The preservation of the record seemed to make it advisable to assign such action by the trial court as error, notwithstanding the fact that if the denial of the motion for nonsuit shall be held by this Court to have been error, the judgment on the verdict would become a nullity.

## ASSIGNMENT OF ERROR NO. III

**The Court erred in denying defendant's motion for a new trial herein, in that the Court thereby erred as a matter of law, and failed to exercise a sound judicial discretion. (Tr. 30-31).**

Appellant's petition for a new trial appears at pages 20 to 23 of the Transcript of Record. The action of the trial court thereon shows that the petition was summarily denied without even requiring argument on behalf of appellees. (Tr. 23).

In assigning this error we are mindful of the rule that the allowance or denial of a petition for a new trial is discretionary and will not be disturbed by this Court unless an abuse of discretion is apparent from the record. In our view of the record and of the law such an abuse of discretion is apparent. We believe, however, that the legal principles applicable generally to this action, as

well as those which we have cited as especially applicable to the motion for nonsuit under our point numbered "5", ante, pages 97 to 101, make their repetition at this point unnecessary. If this Court accepts them as a correct statement of the law, and agrees with our view that there is no competent evidence to support the verdict, it would seem that the action of the trial court in denying appellant's petition for a new trial was an abuse of discretion.

However, if the denial of the motion for nonsuit was error, and shall be so found by this Court, such finding will render unnecessary further consideration of the ruling on appellant's petition for a new trial.

## CONCLUSION

We regret the lengths to which this brief has extended, but as the motion for nonsuit asserted, in substance, that there was no competent evidence in the record to support the verdict and judgment, we deemed it our burden to demonstrate the truth of that assertion by analyzing all material testimony shown in the record, and felt that we could not reasonably ask or expect this Court to assume that burden for us. Such analysis has but served to strengthen our belief that there is no evidence, even a scintilla, sustaining any negligence charged in the complaint, whether of act or of omission.

The judgment appealed from should be reversed and the action ordered dismissed, or reversed and a new trial granted, thereby affording appellees an opportunity to

supply, if they can, proofs that are indispensable to any sound verdict in their favor but which are now wholly lacking.

Respectfully submitted,

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**(Appendix follows)**

## APPENDIX

Table I of this appendix presents in chronological order for the month of December, 1933, and in tabular form, all evidence disclosed by the Transcript of Record and Exhibits as to gate positions, concurrent discharges of water, and concurrent elevations of the lake, with appropriate reference to the Transcript of Record for the sources of the information so shown. As the information shown in such tabular form could not be so set up on pages of the prescribed size without violating Rule 26 as to the permissible minimum size of type, we have used the annexed form of folded sheet. For more convenient reference we are supplying the Clerk with several additional copies of Tables I and II. Such copies will enable the Court to inspect these Tables whenever referred to in the brief, without having to turn to the back of the brief for that purpose.

Table II of the Appendix is explained in its caption.

# APPENDIX

## TABLE NO. I.

Showing extent of gate openings at hour indicated, and discharge through gates at corresponding time (taken from Exhibit A-2 or the transcript); also lake elevation, at corresponding hours, during week of flood. (Taken from Exhibit 13.)

| 1933 Date | Hour | Lake Elevation (Exhibit 13) | Extent of Gate Opening — Gate No. 1 | Gate No. 2 | Gate No. 3 | Gate No. 4 | Gate No. 5 | Approx. Amount of Spill Sec. ft. | Reference to Transcript |
|---|---|---|---|---|---|---|---|---|---|
| Dec. 1 | Midnight | | ... | ... | ... | ... | ... | 0 | Page 125 |
| | 4:00 pm | | 3 | ... | ... | ... | ... | 1,000 | " " |
| Dec. 2 | Midnight | | 3.4 | ... | ... | ... | ... | 1,000 | Exh. A-2 |
| Dec. 3 | Midnight | | 3.4 | ... | ... | ... | ... | 1,000 | " |
| | 1:00 pm | | 7.2 | ... | ... | ... | ... | 2,000 | " |
| Dec. 4 | Midnight | | 7.2 | ... | ... | ... | ... | 2,000 | " |
| | 6:30 am | | 3.6 | ... | ... | ... | ... | 1,000 | " |
| Dec. 5 | Midnight | | 3.6 | ... | ... | ... | ... | 1,000 | " |
| | 6:30 am | | 10.6 | ... | ... | ... | ... | 3,000 | " |
| | 4:15 pm | | ... | 7 | 7 | ... | ... | 16,000 | " |
| | 9:00 pm | | 24 | 7 | 7 | ... | ... | 22,000 | " |
| | 11:15 pm | | 24 | 12 | 12 | ... | ... | 33,000 | " |
| Dec. 6 | Midnight | | 24 | 12 | 12 | ... | ... | 33,000 | " |
| | 7:00 am | | 24 | 15 | 15 | ... | ... | 41,000 | " |
| | 8:30 pm | | ... | 15 | 15 | ... | ... | 35,000 | " |
| Dec. 7 | Midnight | | ... | 15 | 15 | ... | ... | 35,000 | " |
| | 8:00 am | | ... | 10.6 | 10.6 | ... | ... | 24,000 | " |
| | 4:00 pm | | 24 | 6.4 | 6.4 | ... | ... | 20,000 | " |
| Dec. 8 | Midnight | | 24 | 6.4 | 6.4 | ... | ... | 20,000 | " |
| | 1:00 am | | 10.8 | 6.4 | 6.4 | ... | ... | 17,000 | " |
| | 10:00 am | | ... | 6.4 | 2.4 | ... | ... | 14,000 | " |



| 1933 Date | Hour | Lake Elevation (Exhibit 13) | Extent of Gate Opening — Gate No. 1 | Gate No. 2 | Gate No. 3 | Gate No. 4 | Gate No. 5 | Approx. Amount of Spill Sec. ft. | Reference to Transcript |
|---|---|---|---|---|---|---|---|---|---|
| Dec. 9 | Midnight | | 10.8 | 6.4 | 2.4 | ... | ... | 17,000 | Exh. A-2 |
| | 3:00 am | | 21 | 6.4 | 2.4 | ... | ... | 20,000 | " |
| | 8:00 am | | 21 | 10.6 | 10.6 | ... | ... | 30,000 | " |
| | 2:00 pm | | 21 | 14 | 14 | ... | ... | 38,000 | " |
| | 3:00 pm | | 21 | 16 | 16 | ... | ... | 43,000 | " |
| | 4:30 pm | | 24 | 26 | 16 | ... | ... | 52,000 | " |
| Dec. 10 | Midnight | | 24 | 26 | 16 | ... | ... | 52,000 | " |
| | 12:30 am | | 24 | 26 | 26 | ... | ... | 61,000 | " |
| | 3:00 am | | 10.4 | 26 | 26 | ... | ... | 57,000 | " |
| | 7:00 am | | ... | 26 | 26 | ... | ... | 54,000 | " |
| | 10:00 am | | ... | 26 | 18.6 | ... | ... | 49,000 | " |
| | 12:00 M | | 11 | 26 | 18.6 | ... | ... | 52,000 | " |
| | 2:00 pm | | ... | 26 | 18.6 | ... | ... | 49,000 | " |
| | 10:15 pm | | 14 | 26 | 7.2 | ... | ... | 38,000 | " |
| Dec. 11 | Midnight | | 14 | 26 | 7.2 | ... | ... | 38,000 | " |
| | 3:00 am | | ... | 26 | 7.2 | ... | ... | 34,000 | " |
| | 9:30 am | | ... | 14 | 7.2 | ... | ... | 24,000 | " |
| | 11:00 am | | 17 | 14 | 7.2 | ... | ... | 29,000 | " |
| | 1:00 pm | | 24 | 14 | 7.2 | ... | ... | 30,000 | " |
| | 5:30 pm | | 24 | 17 | 7.2 | ... | ... | 34,000 | " |
| Dec. 12 | Midnight | | 24 | 17 | 7.2 | ... | ... | 34,000 | " |
| | 11:30 pm | | 7.4 | 17 | 7.2 | ... | ... | 30,000 | " |
| Dec. 13 | Midnight | | 7.2 | 17 | 7.2 | ... | ... | 30,000 | " |
| | 6:00 am | | ... | 17 | 7.2 | ... | ... | 28,000 | " |
| | 11:00 am | | 24 | 17 | ... | ... | ... | 25,000 | " |
| | 3:30 pm | | 10 | 17 | ... | ... | ... | 22,000 | " |
| | 9:00 pm | | ... | 17 | ... | ... | ... | 20,000 | " |
| Dec. 14 | Midnight | | ... | 17 | ... | ... | ... | 20,000 | " |
| | 10:00 am | | 10.6 | 13 | ... | ... | ... | 18,000 | " |
| | 1:00 pm | | 3.6 | 13 | ... | ... | ... | 16,000 | " |

| 1933 Date | Hour |
|---|---|
| Dec. 15 | Midnight |
| | 6:00 am |
| | 6:00 pm |
| Dec. 16 | Midnight |
| Sunday, Dec. 17 | Midnight |
| | 1:00 pm |
| | 3:30 pm |
| | 5:30 pm |
| | 7:15 pm |
| | Changed gate position |
| Monday, Dec. 18 | Midnight |
| | 1:00 am |
| | 7:00 am |
| | 6:00 pm |
| | 8:30 pm |
| Tuesday, Dec. 19 | Midnight |
| | 12:30 am |
| | 6:00 am |
| | 9:00 am |
| | 11:30 am |
| | 7:00 pm |
| Wednesday, Dec. 20 | Midnight |
| | 10:00 am |
| | 11:00 am |
| | 2:30 pm |
| | 9:30 pm |

| Lake Elevation (Exhibit 13) | Extent of Gate Opening — Gate No. 1 | Gate No. 2 | Gate No. 3 | Gate No. 4 | Gate No. 5 | Approx. Amount of Spill Sec. ft. | Reference to Transcript |
|---|---|---|---|---|---|---|---|
| | 3.6 | 13 | ... | ... | ... | 16,000 | Exh. A-2 |
| | ... | 13 | ... | ... | ... | 15,000 | " |
| | 14 | 5.5 | ... | ... | ... | 10,000 | " |
| | 14 | 5.5 | ... | ... | ... | 10,000 | " |
| | 14 | 5.5 | ... | ... | ... | 10,000 | " |
| 234.8 | 20.4 | 5.5 | ... | ... | ... | 12,000 | " |
| 235.0 | 20.4 | 10.6 | ... | ... | ... | 18,000 | " |
| 235.1 | 20.4 | 17 | ... | ... | ... | 26,000 | " |
| 235.2 | 20.4 | 17 | 12.4 | ... | ... | 40,000 | " |
| | 10.6 | 17 | 14.8 | ... | ... | 40,000 | " |
| 235.0 | 10.6 | 17 | 14.8 | ... | ... | 40,000 | " |
| 235.05 | 26 | 17 | 14.8 | ... | ... | 43,400 | " |
| 235.5 | 26 | 25 | 14.8 | ... | ... | 50,000 | " |
| 234.8 | ... | 25 | 14.8 | ... | ... | 44,000 | " |
| 234.8 | 14 | 25 | 14.8 | ... | ... | 48,000 | " |
| 234.6 | 14 | 25 | 14.8 | ... | ... | 46,000 | " |
| 234.5 | ... | 25 | 14.8 | ... | ... | 42,000 | " |
| 234.55 | 7.4 | 25 | 14.8 | ... | ... | 44,000 | " |
| 234.5 | ... | 25 | 14.8 | ... | ... | 42,000 | " |
| 234.4 | 10 | 18 | 14.8 | ... | ... | 41,000 | " |
| 234.3 | ... | 18 | 14.6 | ... | ... | 38,000 | " |
| 234.3 | ... | 18 | 14.8 | ... | ... | 38,000 | " |
| 234.3 | 25 | 18 | 14.8 | ... | ... | 44,400 | " |
| 234.3 | 10.8 | 25 | 14.8 | ... | ... | 46,000 | " |
| 234.4 | 25 | 25 | 14.8 | ... | ... | 50,000 | " |
| 235.5 | 25 | 25 | 25.6 | ... | ... | 61,000 | " |



| 1933 Date | Hour | Lake Elevation (Exhibit 13) | Extent of Gate Opening — Gate No. 1 | Gate No. 2 | Gate No. 3 | Gate No. 4 | Gate No. 5 | Approx. Amount of Spill Sec. ft. | Reference to Transcript |
|---|---|---|---|---|---|---|---|---|---|
| Thursday, Dec. 21 | Midnight | 236.1 | 25 | 25 | 25.6 | ... | ... | 61,000 | Exh. A-2 |
| | 12:45 am | 236.5 | 25 | 25 | 25 | 10 | ... | 73,000 | " |
| | 4:15 am | 236.75 | 25 | 25 | 25 | 12 | ... | 76,000 | " |
| | 5:30 am | 236.8 | 25 | 25 | 25 | 14.4 | ... | 79,000 | " |
| | 7:45 am | 236.75 | 25 | 25 | 25 | 10 | ... | 73,000 | " |
| | 2:00 pm | 236.8 | 25 | 25 | 25 | 11.6 | ... | 75,000 | " |
| | 3:30 pm | 237 | 25 | 25 | 25 | 14 | ... | 78,000 | " |
| | 4:00 pm | 237.05 | 25 | 25 | 25 | 18 | ... | 85,000 | " |
| | 6:30 pm | 237.1 | 25 | 25 | 25 | 18 | 4.6 | 90,000 | " |
| | 9:00 pm | 237.3 | 26.5 | 26.5 | 26.5 | 26.5 | 4.6 | 100,000 | " |
| | 10:00 pm | 237.4 | 26.5 | 26.5 | 26.5 | 26.5 | 9 | 100,500* (Note 4) | " |
| | 11:00 pm | 237.5 | 26.5 | 26.5 | 26.5 | 26.5 | 4 | 100,000 | " |
| Friday, Dec. 22 | Midnight | 237.6 | 26.5 | 26.5 | 26.5 | 26.5 | Between 9 & 13 | Spill not shown in testimony | Page 133 |
| | 12:16 am | (See Note 3) | 26.5 | 26.5 | 26.5 | 26.5 | 26.5 | 129,000 | Page 97 and 133 |
| | 2:00 pm | 234.9 | 26 | 26 | 26 | 26 | 20 | 112,600 | Page 142 |
| | 3:00 pm | 234.85 | 26 | 26 | 26 | 26 | 20.5 | 112,600 | " " |
| | 4:00 pm | 234.75 | 26 | 26 | 26 | 26 | 20.5 | 112,600 | " " |
| | 5:00 pm | 234.6 | 26 | 26 | 26 | 26 | 20.5 | 112,600 | " " |
| | 6:00 pm | 234.5 | 26 | 26 | 26 | 26 | 20.5 | 112,600 | " " |
| | 8:30 pm | 234.05 | 26 | 26 | 26 | 26 | 14 | 101,000 | " " |
| | 9:00 pm | 234 | 26.5 | 26.5 | 26.5 | 26.5 | 14.5 | 101,000 | " " |
| | 10:00 pm | 233.85 | 26.5 | 26.5 | 26.5 | 26.5 | 14.5 | 101,000 | Page 143 |
| | 11:00 pm | 233.7 | 26 | 26 | 26 | 26 | 8.5 | 92,700 | " " |
| Saturday, Dec. 23 | Midnight | 233.6 | 26 | 26 | 26 | 26 | 8.5 | 92.700 | " " |
| | 1:00 am | 233.5 | 26.5 | 26.5 | 26.5 | 26.5 | 8.5 | 92,700 | " " |

Note: (1) Figures under respective gate columns indicate extent of gate openings in feet, above spillway crest.
(2) Blank lines mean gate in closed position at time indicated.
(3) Lake elevation not accurately reflected in Exhibit 13, due to physical factors incident to opening Gate No. 5.
(4) Clerical error for 105,000 (see Tr. 129).



# APPENDIX

## TABLE No. II.

Showing relation between mean elevation of lake and mean discharge in second feet, from midnight to midnight of each day.

| 1933 | Mean Daily Lake Elevation (Exhibit 9) Feet above Sea Level | Mean Daily Discharge (Exhibit 10) Sec. feet |
|---|---|---|
| Dec. 1 | 235.0 | 2,070 |
| 2 | 235.08 | 2,800 |
| 3 | 235.1 | 2,870 |
| 4 | 235.0 | 3,110 |
| 5 | 234.95 | 8,650 |
| 6 | 235.6 | 39,100 |
| 7 | 235.15 | 25,600 |
| 8 | 234.6 | 14,800 |
| 9 | 235.0 | 33,500 |
| 10 | 235.2 | 52,600 |
| 11 | 234.3 | 32,100 |
| 12 | 234.5 | 32,700 |
| 13 | 234.0 | 23,400 |
| 14 | 234.2 | 16,000 |
| 15 | 234.4 | 12,900 |
| 16 | 234.6 | 10,100 |
| 17 | 234.8 | 17,200 |
| 18 | 235.1 | 46,600 |
| 19 | 234.5 | 40,200 |
| 20 | 234.6 | 44,600 |
| 21 | 236.9 | 84,600 |
| 22 | 235.5 | 114,000 |
| 23 | 233.6 | 58,100 |
| 24 | 234.3 | 29,000 |
| 25 | 234.9 | 27,900 |
| 26 | 234.3 | 26,100 |
| 27 | 234.2 | 20,200 |
| 28 | 234.1 | 13,100 |
| 29 | 234.1 | 15,100 |
| 30 | 234.1 | 15,200 |
| 31 | 234.1 | 14,500 |

No. 8130

# United States
# Circuit Court of Appeals
## For the Ninth Circuit.

INLAND POWER AND LIGHT COMPANY,
a corporation,

Appellant,

vs.

FAY M. GRIEGER and MARY LOIS GRIEGER,

Appellees.

# Appellant's Petition for Rehearing

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## CASES (Continued)



## TEXTBOOKS AND ARTICLES

No. 8130

# United States
# Circuit Court of Appeals
## For the Ninth Circuit.

INLAND POWER AND LIGHT COMPANY,
a corporation,

Appellant,

vs.

FAY M. GRIEGER and MARY LOIS GRIEGER,

Appellees.

## Appellant's Petition for Rehearing

*To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:*

In its briefs filed with this Honorable Court appellant endeavored to present in all necessary detail its analysis of the facts, and to state those principles of law which, it was convinced, should control. Certain of the findings and principles set out in the majority and dissenting opinions indicate, however, that appellant's position was not made clear. Appellant respectfully requests, therefore, that it be given opportunity to restate its position, with particular regard to the principles relied upon in the majority opinion, and that this Honorable Court reconsider its judgment and the principles advanced in support thereof.

## I

### The Principle of Concurring Causes Laid Down in the Majority Opinion Should Not Be the Law of the Case.

In the majority opinion it is stated that on December 21, 1933, the erosion taking place on appellees' lands was caused wholly by natural conditions, that on December 22nd the erosion was caused by two concurrent causes, a combination of natural conditions and human agency. There are, consequently, two periods during which damage was occurring to appellees' lands by flood waters: first, the period prior to the release by appellant of impounded waters; and second, the period subsequent to such release.

Despite such findings, the majority opinion lays down the principle of concurring causes as the rule of the case, and finds in that principle justification for the affirmance of the judgment of the district court. With all respect, appellant contends that that principle should not control; and in support of this contention now proposes to analyze the reasoning of the majority opinion with particular regard to the admitted facts of the case.

#### A. The Principle of Concurring Causes Cannot Apply With Respect to the Injury Suffered by Appellees' Lands Prior to the Release of Impounded Waters by Appellant.

The effect of the majority opinion, appellant contends, is to make appellant liable for *all* erosion which

damaged the appellees' lands. As stated above, the facts are (and the majority opinion so admits) that flooding and erosion took place prior to the release of impounded waters. The resulting damage was in no way attributable to appellant, but solely to unprecedented and unforseeable flood conditions, an act of God, as admitted in the majority opinion. If appellant's dam had never been raised, the lands of the appellees would have been eroded by the natural flood flow of the stream; in fact, *at all times prior to the release of impounded waters the appellees' lands were being subjected to less than the natural flood flow.*

It is fundamental law that a person can be held liable for an injury only if his negligent act was a proximate cause of such injury. This principle ought to require no citation of authority. The following quotation, taken from Shearman & Redfield on Negligence (6th ed., Vol. 1, Sec. 26, p. 48) states the general rule of proximate causation:

> "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred."

The case of *The Memphis and Charleston Railroad Company v. Reeves,* 10 Wall. 176, 189; 19 L. ed. 909, 913 (cited in the dissenting opinion) illustrates the application of this principle. In that case the act of the carrier, sought to be charged for injury to plaintiff's tobacco, was held to be a remote cause—the flood, an

act of God, the proximate cause. At the trial the following instruction was requested but not given:

> "When the damage is shown to have resulted from the immediate act of God, such as a sudden and extraordinary flood, the carrier would be exempt from liability, unless the plaintiff shall prove that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proven by the plaintiff, or must appear in the facts of the case."

In discussing this instruction, the Supreme Court said:

> "It is hard to see how the soundness of this proposition can be made clearer than by its bare statement. A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused.
>
> "What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it."

In view of the foregoing it is difficult to understand why the majority opinion should *assume* but not *decide* the soundness of the principle that a person is not liable

for damage caused by an act of God, particularly when that opinion concedes as true that "the evidence shows some damage by the act of God prior to the time when appellant's negligent act concurred", and that the proof does disclose that "erosion occurred prior to that time". The result of the refusal of the majority to apply this established principle of causation, coupled with the failure of the majority to compel the appellees to demonstrate what part of the damage resulting to their lands was attributable to appellant's act, is that appellant is held liable for all injury to appellees resulting from the flood flow of the stream.

This result cannot be justified through the application of the doctrine of concurring causes. That doctrine can have no possible application to the injury which occurred prior to the release of impounded waters. During that first period there was only one cause—an act of God. The majority opinion, at page 9, concedes this. It follows, therefore, that on no sound principle of law or justice can appellant be held responsible for damages resulting from such cause, since, having been entirely free from any connection with the chain of causation resulting in such damage, appellant was not a cause in fact, much less a proximate cause thereof.

Appellant further contends, however, that even if its act in releasing the impounded waters concurred with the act of God in producing the injury complained of, nevertheless appellant can be held liable, if at all, for only that part of such injury directly resulting from and attributable to such negligent act.

**B. The Principle of Concurring Causes Cannot be Invoked to Hold Appellant Liable for Any Injury Not Directly Attributable to Appellant's Alleged Negligent Act.**

In discussing this point, appellant will first analyze the principle as applied in the majority opinion and the cases relied upon therein, and will then discuss those principles which, appellant contends, should control.

On page 9 of the majority opinion the following appears: "Thus it is apparent that water, from natural causes, and water negligently discharged by appellant, eroded appellees' property causing damage. The two causes were concurrent." And on page 10 the majority opinion, after setting out, in part, the general rule as stated in Corpus Juris continues: "One specific application [of the general rule] is where damage is the result of two concurring causes, one of which is the negligence of defendant and the other, the negligence of a third person, 'the defendant is liable to the same extent as though it had been caused by his negligence alone'." To this proposition a number of cases are cited, the first being *Miller v. Union Pacific R. Co.*, 290 U. S. 227, 78 L. ed. 285 (1933). The facts of that case are doubtless well fixed in the mind of the court. In essence the case is one where the two concurring negligent acts combined to produce a result *which would never have taken place in the absence of either.* As the Supreme Court said—"Instead of a remote cause and a separate intervening, self-sufficient, proximate cause, we have here concurrent acts, co-operating to produce the result." These concurring causes were characterized by the court as "two inseparable negligent acts which, uniting to

produce the result, constituted mutually contributing acts of negligence on the part of the railroad company and the driver of the automobile". The court added—"The result, therefore, is that the contributory negligence of the driver did not interrupt the sequence of events set in motion by the negligence of the railroad company or insulate them from the accident, but concurred therewith *so as to constitute in point of time and in effect what was essentially one transaction.*" (Italics added.)

Thus, the *ratio decidendi* of the case is that each of the two negligent acts complained of was a contributing cause without which no injury could have resulted. The act on which the plaintiff in that case sought to predicate liability was a *causa sine qua non* of the result. In all of the cases cited and relied upon in the majority opinion the negligent act complained of was such a cause, operating proximately in conjunction with another cause to produce the injury. In the interest of brevity appellant will not attempt an analysis of each of those cases, although appellant might justifiably argue that certain of them do not relate to the principle of concurring causes. In each of the cases relating to that principle the person sought to be charged in full for the injury resulting from the concurring causes was a *causa sine qua non,* and thus an active, proximate and indispensable cause of such injury. In the *Grand Trunk Ry. Case* [1] the negligent acts producing the injury constituted one transaction in point of time and in effect. In the

(1) Grand Trunk Railway Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266 (1883);

*Deserant Case* [2] and in the *Wilmington Star Mining Co. Case* [3] the negligent act of the defendant was a cause without which the explosion could never have happened. In the *Gila Valley Ry. Co. Case* [4] and the *Kreigh Case* [5] the accident could not have occurred if the defendant had maintained safe working conditions for employees. *The Salton Sea Cases* [6] went off on the ground that floods of the Colorado River would never have reached the Salton Sink if the defendant's ditches had never been opened or if they had been properly maintained. In the *American Coal Co. Case* [7] death would not have come to the deceased if the defendant had not blocked a watercourse with a refuse pile. The child in the *Howe Case* [8] would never have been killed by the log if defendant had not left it in the path of the landslide. And in the *Grant Case* [9] the force of the lightning would never have reached the girl's body if the defendant had not strung wires from the tree to the tent.

It is clear that in all the cases just cited the damage complained of could never have happened without the defendant's contributing act, and that such act was essential to the result of the concurring causes. The appellant contends, therefore, that this line of cases and

(2) Deserant v. Cerillos Coal Railroad Co., 178 U. S. 409, 44 L. ed. 1127 (1899);
(3) Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708 (1906);
(4) Gila Valley, G. & N. Ry. Co. v. Lyon, 203 U. S. 465, 51 L. ed. 276 (1906);
(5) Kreigh v. Westinghouse, C. K. & Co., 214 U. S. 249, 53 L. ed. 984 (1908);
(6) Salton Sea Cases, The, 172 Fed. 792 (C. C. A.—9th—1909);
(7) American Coal Co. v. De Wese, 30 F. (2d) 349 (C. C. A.—4th—1929);
(8) Howe v. West Seattle Land & Improvement Co. et al., 21 Wash. 594, 59 Pac. 495 (1899);
(9) Grant v. Libby, McNeill & Libby, 160 Wash. 138, 295 Pac. 139 (1931).

the principle to which they are cited can have no proper application to the facts of the present case. In those cases the injury could be traced only to the combination of causes; in the case in issue part of the injury can be traced directly to but one of the concurring causes—the act of God. The majority opinion admits injury caused by the natural flood flow of the stream both before and after the release of the impounded waters.

The majority opinion further asserts that the rule of concurring causes is no different when such causes are an act of God and the negligent act of the defendant. This assertion is true only in a limited sense. If, as in certain of the cases cited in the majority opinion, the negligent act of the defendant makes operative the other concurring cause, the act of God, so that injury results which would not have occurred without such negligent act, the defendant will be held liable for all damage. Beyond this point the doctrine cannot be extended. And it can have no application to a case where the damage complained of results partly from an act of God and partly from the negligent act of the defendant. Under such circumstances the doctrine of joint tort-feasors does not apply. The following quotation from a well reasoned article entitled "Multiple Causation and Damage" by Chief Justice Peaslee of the Supreme Court of New Hampshire (47 Harvard Law Review 1127, 1131) is illustrative:

> "Where both are tortfeasors, the rule that each is liable for the result the two caused gives a full recovery from either. But if one cause is innocent, the wrongdoer is merely answerable for his own

wrong and its results. In the latter case he escapes liability for the damage resultant from the innocent cause since neither he nor anyone for the results of whose wrong the law makes him answerable has done the injury. The ground upon which the joint tortfeasor is held for all the damage does not exist where one of the causes is innocent."

The following cases stand for the proposition stated above:

In *Law v. Gulf States Steel Co.,* 229 Ala. 305, 310, 156 So. 835, 839 (1934), involving an action for flooding of plaintiff's land through the operation of a dam by the defendant, the court said:

"Appellants contend that if these obstructions or any of them contributed to the injury to the crops, defendant would be liable for the entire injury, although without them there would have been injury by floods, or even the act of God. *This contention seeks to apply the doctrine of joint tortfeasors.* (Italics added.)

"The case of Welch v. Evans Bros. Construction Co., 189 Ala. 548, 66 So. 517, is relied upon. That case involved damages to stock of merchandise from the negligence of a construction company in leaving open a hole in the roof over night. A rain came and damaged the goods. The case does deal with the injury as caused by the concurrent negligence of defendant and an act of God. This term is obviously used in the sense of a natural recurrence of nature against which defendant could have and should have guarded, and the entire injury been avoided.

"It is no authority for holding one liable for the proximate consequence of something over which he had no control, and which would have occurred if the wrong charged to him had never been done.

"The action is not analogous to a case of joint tort-feasors, wherein each concurs in creating dangerous conditions without which no injury would have occurred.

"We hold that, if injury to these crops would have resulted regardless of any construction work of this defendant, whether from customary or extraordinary floods, the defendant is not liable therefor; but its liability, in such case, is limited to such increased injury, if any, as proximately resulted from such obstructions, and does not include injuries which would have occurred had no obstructions been made."

In *Pfannebecker v. Chicago, R. I. & P. Ry. Co.*, 208 Ia. 752, 755; 226 N. W. 161, 162 (1929), involving an action for the flooding of plaintiff's lands by reason of an embankment erected by defendant which caused flood waters to back up and damage such lands, the court held that there was liability only for damage resulting from defendant's negligence, and not for damage resulting from flood conditions, saying:

"This being true, appellee could not succeed, for he is entitled to recovery within the instructions, if at all, only for the injury caused by the alleged obstructions. If, then, part of the loss was due to the overflow of German creek, appellee can only obtain from appellant the additional or added damages for the crop, pasture, and hay land destruction resulting from the backwater."

In *McAdams v. Chicago, R. I. & P. Ry. Co.*, 200 Ia. 732, 734, 735; 205 N. W. 310, 311, 312 (1925), the court said:

"All parties concede that, even if the rocks had not been so placed, the crops would have been dam-

aged by overflow; and it is conceded, or at least is the law, as stated in the instructions, that the defendant could only be liable, in any event, for the additional damage caused to said crop by reason of the placing of said rocks about the bridge and trestle. * * *

"Plaintiff cannot charge against the defendant company the damage to the crop by the flood which was not caused by the alleged negligent acts of the defendant."

To the same effect are:

*Ft. Worth Ry. Co. v. Speer,* 212 S. W. 762 (Tex. Civ. App., 1919).

*Chicago R. I. & G. Ry. Co. v. Martin,* 37 S. W. (2d) 207 (Tex. Civ. App., 1931).

*Sherwood v. St. Louis S. W. Ry. Co.,* 187 S. W. 260 (Mo. App., 1916).

The proposition under discussion finds further support in the case of *Radburn v. Fir Tree Lumber Company* (83 Wash. 643, 145 Pac. 632), cited and relied upon in appellant's brief (p. 90). In the majority opinion it was said that if that case reached a result different than that reached in the cases cited in the opinion in support of the principle of concurring causes, then the *Radburn Case* must be considered as overruled by the case of *Grant v. Libby, McNeil & Libby* (160 Wash. 138, 295 Pac. 139—a later Washington decision in which the *Radburn Case* was neither referred to nor cited). With all respect, appellant submits that this conclusion of the majority opinion is without justification.

The two cases may be readily distinguished. In the *Radburn Case* the damage complained of was the direct result of two causes: first, the unusual rainfall; and second, an increase in flood waters backed up by the defendant's dam. The injury attributable to the first cause would have resulted if the defendant had not maintained its dam. In the *Grant Case,* however, the death of the girl could not have been caused by the lightning bolt if the defendant had not strung wires (negligently, it was alleged) from the tree, later struck by the bolt, to the tent occupied by the girl. Without the human intervention of the defendant the force of the lightning bolt would have been expended at the point of striking and could not have reached the girl's body. In other words, the defendant's act was a *causa sine qua non* of the result—the death of the girl.

In the present case appellant's act was not such a cause. The following hypothetical situation may serve to emphasize the distinction appellant contends for in its discussion of the principle laid down in the majority opinion.

A plaintiff's lands are on a watercourse below the confluence of the main stream and a small tributary. On such tributary the defendant maintains a dam. Because of unusual rains the stream and tributary became swollen with flood waters. The defendant impounds part of the water of the tributary, releasing less than the natural flood flow. The plaintiff's lands are flooded and eroded. At the height of the flood the plaintiff opens his gate and releases some impounded water in addition to the concurrent natural flood flow. Such additional

water is measured and found to be but a small part of the total volume of water in the main stream after the gate was opened. It is obvious that on no theory of law can the defendant be held liable for the damage which took place prior to his opening of his gate, and that if defendant can be held liable for any damage such liability must be confined to that damage directly resulting from the release of the water discharged in excess of the natural flood flow of the stream over the plaintiff's lands. In the present case it is immaterial that all of the waters which flooded the appellees' land passed appellant's dam.

Appellant further contends, however, that it is not liable in damages for the discharge of the small quantity of water which, it admits, was in excess of the natural flood flow.

## II

**There is no Substantial Evidence in the Record From Which the Jury Could Have Reasonably Determined Within the Rules of Liability Any Damage Attributable to Appellant's Negligence.**

Appellant's liability cannot be made out by establishing its negligence alone. In addition, appellees must have established by competent evidence that the negligence complained of resulted in substantial damage.

The only testimony contained in the record, with respect to the probable character and effect of the negligence of appellant in discharging the additional volume of water into the swollen river, was that of engineer

Roberts. The majority opinion briefly summarized his testimony as follows:

> "Engineer Roberts testified that the increase over the natural flow on December 22nd, was approximately 6 per cent, which would be about 6800 second feet; that if water was on the Grieger land to a depth of six feet, this additional discharge would raise the water on the Grieger place 'a little over 4 inches;' that the mean discharge of 114,000 second feet 'would have sufficient force to be a competent force to cut away land, with the velocity that the stream has;' that the drop in the elevation of the impounded waters 'would have some effect on Mr. Grieger's land'."

To establish liability it is not sufficient that the water so discharged by appellant would have *"some effect"* upon appellees' lands; such discharge must have had a *substantial* effect before it may be regarded as a factor in the chain of causation. As stated in Section 431 of the Restatement of the Law of Torts:

> "The negligence must also be a substantial factor as well as an actual factor in bringing about the plaintiff's harm. The word 'substantial' is used to denote the fact that the defendant's conduct has such effect in producing the harm as to lead reasonable men to regard it as a cause * * *."

See also, *Gully v. First National Bank,* ..... U. S. ....., 81 L. ed. 44, 48 (1936), where it was said:

> "One could carry the search for causes backward, almost without end. (Citing cases.) Instead, there has been a selective process which picks the *substantial* causes out of the web and lays the other ones aside." (Italics added.)

In a later portion of the same paragraph in which engineer Roberts stated that the discharge of impounded water by appellant would have "some effect", he further admitted that without a more detailed computation regarding the conditions and character of the channel at the time such discharge was made he would be unable to know anything about the effect of such waters upon the appellees' lands.

> "As to whether I would be able to testify with any degree of accuracy at all without having possession of those figures, as to how much water it would take to overflow the banks, or to wash away Mr. Grieger's land—you couldn't do it without some computation that covered the question you asked: *in fact, I wouldn't know anything about it at all without those figures.*" (Tr. 196-197.) (Italics added.)

Any amount of water, however small, discharged into the stream might conceivably have had "some effect"; but additional evidence should have been produced before any jury could properly have found that appellant's action was sufficient to constitute the *substantial* effect required by the rules of causation. If, until additional facts and figures were given him, an experienced hydraulic engineer could give no estimate other than a mere surmise that the additional volume of water discharged into the river by appellant "would have some effect", how can a verdict of a jury, resting solely upon the testimony of the engineer, amount to more than speculation or conjecture?

All that appellees did to establish a basis of appellant's liability was to show that appellant did in fact

discharge into the river a volume of water estimated from facts and records as amounting to a little less than six per cent over the natural stream flow (Tr. 186) and to obtain the opinion of an engineer that such additional discharge of water would have some effect.

It is felt that the illustration at page 11 of the majority opinion, wherein comment is made upon inferences available to the jury, emphasizes precisely the inferences open to the jury from the evidence before it. Since there was nothing before the jury except the fact that 6% of additional water was discharged by appellant, they were obviously left free to indulge in any one or more of the number of inferences there listed in determining what damage, if any, was caused thereby. Yet there was no evidence tending to support a choice of any one of these inferences more than any other.

It is a conceded principle of law that a party cannot recover if his evidence leaves the jury open to select at will inferences, some of which may be favorable and some unfavorable, but none of which is supported by more than sheer speculation and conjecture.

> *Atchison T. & S. F. R. Co. v. Toops,* 281 U. S. 351, 354; 74 L. ed. 896, 899 (1930):
>
> "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employer's Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer."

As pointed out in the illustration at page 11 of the majority opinion, inferences which would result in a verdict favorable or unfavorable to appellees, depending upon the choice made, are equally available to the jury from the evidence. This being true, it was incumbent upon the jury to find for the appellant under these circumstances.

> *Pennsylvania R. Co. v. Chamberlain,* 288 U. S. 333, 339; 77 L. ed. 819, 823 (1933):
>
> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other before he is entitled to recover." (Citing cases.)

In the case at issue the facts are clear that for more than 12 hours prior to the release of impounded waters the flood had been sweeping over the light soil of the appellees' lands and continued to do so in greater volume on December 22, regardless of the release by appellant of sufficient of the impounded waters to increase the volume of the natural stream flow by a little less than 6%. In view of those destructive conditions existing prior to the time that the appellant discharged the waters for which liability was imposed, and considering further that those conditions continued naturally and with increasing force thereafter, and would have done so although appellant discharged no added volume of water, it is submitted that the less than 6% of additional amount of water so discharged by appellant

could not reasonably be considered from the evidence as a substantial cause of the damage to appellees' lands. At least, appellees' failure to produce more evidence constituted an omission of proof on a proposition vital to appellees' recovery. It was not the duty of appellant to supply such proof.

In the well reasoned case of *Montgomery Light & Water Power Co. v. Charles, et al.,* 258 Fed. 723, 731 (D. C.—Ala.—1919), which on the facts is almost identical with the present action, the court, after discussing the relatively slight amount of water discharged into the river by the negligence of the company in maintaining its dam as compared to the total volume of the flooded stream, held as a matter of law that any negligence of the company that might be complained of was insufficient to constitute proximate cause, saying:

> "If the plaintiffs in the law actions had succeeded in establishing negligence on the part of the Power Company, it would be impossible to trace the damages complained of to that negligence with any reasonable degree of certainty. In addition to the enormous volume of water flowing down the river from its upper reaches, there were contributions made to the volume by the flow of a considerable number of tributary streams below the Power Company's dam. The river itself and these streams drained an area of thousands of square miles. It would have been impossible to measure the effect of such a relatively small volume of water impounded by the flashboards on the lands of Charles and others below the Power Company's dam."

See also, *Sherwood v. St. Louis S. W. Ry. Co.,* 187 S. W. 260, 263 (Mo. App.—1916):

> "On a full consideration of this case with my associates, we have concluded and concur in holding that the flood in question was so overwhelming in character and destructive in its results that there is no substantial evidence showing that the injury to plaintiff's farm resulted as an efficient cause from the narrowness of the opening through defendant's embankment * * *."

## III

**If the Act of God Would Have Produced Substantially the Same Damage Irrespective of the Intervention of Negligence of Appellant, the Latter Cannot be Regarded as a Cause of the Injury.**

In the illustration used in the dissenting opinion, wherein a fire caused by lightning burns 500 acres of grain and a neighbor tortiously starts a brush fire which burns with the prior fire and consumes 100 acres more, it is plain that the tortious neighbor cannot be held for the 500 acres burned prior to the inception of the tortious act, since as to such damage the neighbor's act was not the proximate cause or even any cause. But we must go further than this before fixing liability even as to the last 100 acres, for if it can be said that the damage to the last 100 acres would have occurred irrespective of the negligence of the neighbor, he is not liable therefor even though his negligence contributed to the damage.

The record of the case at bar contains not the slightest evidence relative to this proposition. Whether the torrential flood conditions would or would not have produced substantially the same amount of damage to appellees' lands, irrespective of the alleged negligence of appellant, does not appear. No opinion or evidence upon this question was asked of appellees' hydraulic engineer Roberts or given by any witness, expert or otherwise, in the course of trial. In the absence of any evidence it cannot and should not be assumed arbitrarily that, in light of existing conditions, the slight amount of additional water released by appellant produced or could produce any damage which would not under the circumstances have reasonably been expected to occur. While it is ordinarily within the province of the jury to determine such matters, there must be some evidence from which sound conclusions on this question could have been reached.

The production of evidence on the foregoing question is an essential part of appellees' case in establishing the liability of appellant. It is not a matter of defense for appellant to negative. On the state of the record, a material factor in appellees' case has been omitted and may not be supplied, in the absence of evidence, by the guess of the jury.

The reasons underlying such principle are well stated in Chief Justice Peaslee's article (supra). Damage proximately resulting from the negligence of the defendant is always an essential element to the maintenance of a cause of action for negligence. If land will inevitably be destroyed by an onrushing torrent of water

as a consequence of an act of God, no real harm or damage to such property is sustained by reason of a later negligence toward it by a third person even though such negligence may cause damage thereto.

Justice Peaslee explains this theory as follows:

> "Take away the defendant's causative act, and how much was the plaintiff's property worth? If the innocent conflagration were then bearing down upon the plaintiff's house, it is evident that it then had no value, and the defendant ought not to pay. (p. 1134.)
>
> "* * * So long as the innocent cause is in actual inescapable operation before the wrongful act becomes efficient, it is not apparent how the latter can be considered the cause of the loss. Causation is a matter of fact, and that which is not in fact causal ought not to be deemed so in law. The defendant's act may have furnished some cause for the fire, but causing a fire at that time and under those circumstances [defendant's negligence in setting a fire which joined with an already destructive fire] did not injure the plaintiff, and neither moral justification nor logic would charge the wrongdoer for damage which he had not caused." (p. 1130.)

In the exceptionally well reasoned case of *Perkins v. Vermont Hydro-Electric Corporation*, 106 Vt. 367, 380; 177 A. 631, 636 (1934), which involved an action for damage resulting from a flood of plaintiff's land through negligence of defendant in operating its dam, which concurred with an act of God in the form of unusual rain, the court observed:

> "The negligence of the defendant must, however, be an active and cooperating cause of the

damage. (Citing cases.) 'The mere existence of negligence which is not a producing cause of the injury creates no liability.' (Citing case.) It must not be 'a merely fanciful or speculative or microscopic negligence which may not have been in the least degree the cause of the injury.' (Citing cases.) *'So, if the act of God is so overwhelming as of its own force to produce the injury independently of the negligence of the defendant, the latter cannot be held responsible.'* (Citing cases.)

"The principle involved is simply that of causation. Except where there are joint tort-feasors, 'a defendant's tort cannot be considered the legal cause of plaintiff's damage, if that damage would have occurred just the same even though defendant's tort had never been committed.' Prof. Jeremiah Smith, 'Legal Cause in Actions of Tort', 25 Harv. Law Rev. 303, 312, Id. 103, 109." (Italics added.)

See also, Shearman & Redfield on Negligence (6th Ed., Vol. 1, Sec. 39, p. 77):

"But if the superior force would have produced the same damage, whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury."

## IV

**The Principle Laid Down in the Case of Radburn v. Fir Tree Lumber Company Should Have Been Accepted by This Court as Controlling.**

In conclusion, appellant feels it necessary to touch briefly on the statement in the majority opinion, appearing at the top of page 10, that "it must be borne in mind that state decisions establishing a rule of liability for

negligence are not binding on the Federal Courts." This statement is prefatory to the majority's discussion of the principle of concurring causes, laid down as the controlling principle of the case.

Appellant does not assert that in all cases the decisions of a state court are conclusively binding on Federal courts sitting within the state where the cause of action arose. It does assert, however, that in the present case the decisions of the State of Washington cannot be so lightly dismissed as the majority opinion would indicate.

Although the principle of the independent judgment of Federal courts on matters of general law has received varied application, this much seems certain—a Federal court should give full weight to a decision of the highest court of a state if there is no established principle of federal jurisprudence which is in direct conflict with the rule of that decision. If a decision of the state court is a statement of the common law of that state, then a Federal court, in forming its independent judgment, based upon the same state of facts, must turn to the same sources of general law. And unless there are weighty considerations requiring the Federal court to establish a principle of law different from that laid down by the state court, the state decision controls. As stated by the Supreme Court in the case of *Black and White Taxicab & Transfer Company v. Brown and Yellow Taxicab & Transfer Company,* 276 U. S. 518, at 530; 72 L. ed. 681, at 686 (1928):

> "As respects the rule of decision to be followed by Federal courts, distinction has always been made between statutes of a state and the decisions of its

courts on questions of general law. The applicable rule sustained by many decisions of this court is that in determining questions of general law, the Federal courts while inclining to follow the decisions of the courts of the state in which the controversy arises, are free to exercise their own independent judgment."

In the present case, appellant contends that the principle laid down in the case of *Radburn v. Fir Tree Lumber Company* (83 Wash. 643, 145 Pac. 632), is a generally accepted principle of elementary law, and that this Court, in forming its independent judgment by searching the general jurisprudence common to all of the states, must necessarily find that principle to be such. The principle of concurring causes, appellant submits, cannot have application to the present case. There is, then, no conflict between federal and state decisions with respect to the principles which are applicable to this case. It follows, therefore, that not only should this Court incline to follow that decision of the Supreme Court of the State of Washington, but it should hold, in the exercise of its independent judgment, that the principle laid down in that case is declaratory of generally accepted law.

We respectfully urge that the petition for rehearing be granted.

ROBERT E. EVANS.

LAING & GRAY,
John A. Laing,
Henry S. Gray,

Attorneys for Appellant
and Petitioner.

## CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for the appellant, the petitioner in the above entitled cause, and that in my judgment the foregoing petition for rehearing is well founded in point of law as well as in fact, and that said petition for rehearing is made in good faith and is not interposed for delay.

HENRY S. GRAY,

Of Attorneys for Appellant and Petitioner.

No. 8130

# In the United States
# Circuit Court of Appeals
## For the Ninth Circuit

INLAND POWER AND LIGHT COMPANY,
a corporation, Appellant,

vs.

FAY M. GRIEGER and MARY LOIS GRIEGER,
Appellees.

## Appellees' Brief

**Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.**

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**Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.**

## EXPLANATORY NOTE

It appears that there is some ambiguity in the record with regard to the numbering of Exhibits No. 9 and 13. One is a chart for Gurley Graphic

Recorder, the other is a tabulated record of mean daily lake elevations. Neither counsel for appellant nor counsel for appellees had numbered copies of these exhibits before them at the time of writing their briefs, and we believe that there may be some misconception of the proper numbering of these two exhibits.

It appears that where appellants have referred to the chart for the Gurley Graphic Recorder they have referred to it as Exhibit No. 13. We believe that this may be an error. However, in order to avoid confusion we have also referred to the same exhibit by that number. Therefore, in writing our brief, wherever we refer to Exhibit No. 13, we have reference to that exhibit which is titled "Chart for Gurley Graphic Recorder" and has a continuous pencilled line showing the lake elevations from December 16 to December 22, inclusive, and bears the name of H. W. Schmidt at the lower right hand corner. We have discussed this matter with counsel for appellant and are advised that where in their brief they refer to Exhibit No. 13 they have in mind the "Chart for Gurley Graphic Recorder" and where they refer to Exhibit No. 9 they have in mind that exhibit which is a tabulated record of the mean daily elevation of Lake Merwin.

A COPY OF THE EXHIBIT TO WHICH WE HAVE REFERRED IN OUR BRIEF AS EXHIBIT NO. 13 IS APPENDED HERETO.

## STATEMENT OF THE CASE

This action was tried by jury and it is our understanding that in this Court, appellees are entitled to the testimony most favorable to his cause appearing in the record, and that the case is not to be tried here upon appellant's evaluation of the testimony most favorable to itself.

We shall attempt to point out, not only in its narrative statement, but in its discussion of the case throughout, appellant has selected the bits of testimony most favorable to itself, and has entirely ignored the testimony which sustains the verdict.

This action was brought by appellees to recover damages sustained to their land and personal property caused by the release of impounded flood waters, released by appellant through the flood gates of appellant's dam on or about the 22nd day of December, 1933.

At the time this controversy arose, appellant owned and operated a hydro-electric plant on the Lewis River, located at Ariel, about 12 miles north and east of Woodland, Washington. The dam erected on this power site backs up the water in the Lewis River and creates a reservoir, known as Lake Merwin, which covers an area of about 4,000 acres and raises the elevation of the surface of Lake Merwin to upward of 235 feet. The dam structure is provided with 5 flood gates, disposed in the upper portion of said dam which provide means for

controlling the elevation of the water in the reservoir. The arrangement of the power plant and dam is such that the waters do not flow over the top of the dam, but all food waters except a small portion used for generation of power, must be released or spilled through these flood gates.

At the time this controversy arose, the plaintiffs owned and operated a dairy farm located on the bank of the Lewis River about 4 miles downstream from appellants' dam.

Inasmuch as appellants' motion for non-suit, motion for directed verdict, and petition for a new trial were based upon their challenge to the sufficiency of the evidence to support the verdict, it is necessary for appellees to review, in narrative form, the evidence upon which the verdict was based.

Exhibit No. 10 is a record compiled by the U. S. Geological Survey and shows the mean or average daily flow of the Lewis River at Ariel, Washington.

Plaintiff's Exhibit No. 13 is a graphic history of the elevation of the reservoir, often referred to in the record as Lake Merwin.

This is a record made under the supervision of the United States Geological Survey and is submitted to the office of the U. S. Geological Survey under requirements of the Federal Power Commission (Transcript of Record, 106).

It is a photostatic copy of the original record

made by an automatic stage recorder located immediately behind and on the upstream side of the dam. An examination of the exhibit provides an accurate history of the storage and release of waters behind the dam. The record shows, that the impounded waters cover an area of about 4,000 acres (Tr., 145). It is readily evident that a sudden reduction in the elevation of the lake would release a tremendous volume of water in addition to the natural flow of the stream.

Exhibit No. 13 further discloses that shortly after midnight on December 22, 1933, the elevation of the lake was sharply lowered, followed by a continued lowering for a period of 24 hours.

It will be observed that shortly after midnight December 22, 1933, waters were abruptly released. The volume of water so released in addition to the natural flow of the stream, is easily susceptible to calculation. This exhibit shows that during the period of 30 minutes immediately succeeding midnight the elevation of the lake was lowered 6 inches in about 30 minutes. The area of the lake being 4,000 acres, this would mean a discharge of 2,000 acre feet, or 87,120,000 cubic feet of water in addition to the natural flow of the stream, all in the space of 30 minutes. Thirty minutes equal 1,800 seconds; 87,120,000 divided by 1,800 equals 48,400 cubic feet per second, which represents the acceleration of the stream over and above its natural flow for that period.

Taking Exhibit No. 13 and Exhibit No. 10 together, on examination, it appears that shortly after midnight December 22, 1933, a tremendous volume of water was released, the elevation of the lake was lowered six inches in 30 minutes, accelerating the flow by 48,400 cubic feet per second over and above the natural flow, and reaching the peak discharge of 129,000 cubic feet per second (Exhibit No. 10). Obviously, where the surplus over the natural flow was 48,400 second feet, and the total was 129,000 second feet, the natural flow must have been 129,000 minus 48,400 or 80,600. Hence there was an acceleration of approximately 60 per cent for the peak discharge period—enough surplus water to cover more than 30 acres 66 feet deep in 30 minutes —a surplus flow sufficient to cover 1000 acres 2 feet deep in 30 minutes!

Examining Exhibit No. 13 further, it may be observed that the lake elevation was lowered 2.1 feet in a space of 9 hours and 44 minutes from 12:16 A.M. to 10:00 A.M., December 22nd, which means that during such period 8,400 acre feet or 365,904,000 cubic feet of water were released in excess of the natural flow of the stream. Nine hours and forty-four minutes equals 35,040 seconds; 365,904,000 divided by 35,040 equals 10,440 cubic feet per second, which represents the average acceleration of the stream during this period. The average acceleration however, embraces a maximum and a minimum. The maximum occurring when all gates

stood wide open at lake elevation 237.6 and the flow continuing to decrease as the elevation of the lake continued to drop. It is therefore obvious that the acceleration on the natural flow and the effect of a sudden release of storage waters cannot properly be computed upon the AVERAGE acceleration over a long period of time.

Pursuant to further observation of Exhibit No. 13, it appears that from about 12:16 A.M. of December 22nd, to midnight the beginning of December 23, 1933, the elevation of Lake Merwin was lowered about 4 feet, which represents a volume of 16,000 acre feet of water released in excess of the natural flow, or a mean acceleration of about 8,000 cubic feet per second for that period.

The figure 129,000 on Exhibit No. 10, at the top right hand corner of the chart, represents the peak discharge of cubic feet per second occurring shortly after midnight, December 21 to December 22 (Calkins Testimony, Tr. 96-97). (The letters E. S. T., indicate that from December 18, 1933 to January 4, 1934, the flowage was estimated, due to the fact the gauging station below the dam had been destroyed).

In view of Exhibits No. 10 and 13, the jury could reach but one conclusion—that enormous quantities of water IN ADDITION to the natural flow of the stream were discharged. Whether or not the flood gates were operated according to the com-

pany's log (Exhibit No. A-2) was a question of fact for the jury to determine.

All of the testimony was to the effect that during all of the month of December, 1933, the Lewis River Basin was visited by heavy rainfall and periods of warm weather. And instead of allowing the flood waters to run off as they were wont to do by nature, the waters were additionally impounded, only to be abruptly released on December 22nd.

FRANK MILES TESTIFIED: (Tr., 112) "In December, 1933, it was very rainy. The rain didn't affect the flow of the Lewis River down at my place, but it was filling the dam. Not much of anything was happening to the Lewis River, that is down where I live, three miles below the dam, because they run the wheel up there, and they use just what comes in, and then what is over they use for storage. Sure I seen what was taking place in the dam during the rainy period; the lake was raising of course. During the period up to December 22, 1933, prior to the 22nd,—yet, I believe the small one, they call No. 1, that was pretty well open pretty much of the time. That is if I remember right, and I think there was another time—in fact I went up there maybe every three or four days or maybe every other day, because I had a stand in with the superintendent of the fish hatchery there, and he had a car and he went

up to look at the traps, and always said, "Come on, Dad, and take a ride," and I get in and that is how I seen the gates about every day, and that is how I seen the reservoir (Tr. 115). "I was at the dam on December 20th; the gates were about the same as the day before. The No. 1 was up about 10 feet or maybe more, and No. 2, as they call it, I would call it No. 2, was out about six or eight feet, but the others was tight. Yep. I was there again on the 21st; that was the day she was just about overflowing. By looking across the channel you would find that it was up against the coping, that would be six inches, but of course it could not have been because the glistening of the water would make some difference. Mr. Shore was not there that day. There was a man there they call a roustabout. I don't know what his name is. The gates on the 21st were about the same condition as they was the last time I seen them. On the 21st the gates were just the same as the day before. They might have been up a little."

MR. CARL E. INSULL TESTIFIED: (Tr., 58) "Tuesday was the 19th of December; I recall the condition of the weather that day. I live mostly on the Lewis River banks, and I watered my cattle in the river. On Sunday, December 17th, I watered my cattle in the forenoon, but in the afternoon and after that on Monday I can't water it in the river; the river

was very low at the time. . . . . The current was highest on the morning of the 22nd, between 12 and 1 o'clock; that is for one hour. That is when the flood reached its peak, and that is when the current was the swiftest. After that it was stationary just a few hours; that the flood started slowly to come down." (Tr., 67).

MR. GRADY PHILLIPS TESTIFIED: (Tr., 69) "Mr. Grieger's property adjoins my property on the west. I saw the river running along their place at that time. I saw it practically every day for 8 or 10 days, until the 21st. Up to the 20th there was not any cutting of banks of the Lewis River along the Grieger's property that was noticeable to me (Tr., 70). I did not notice any noticeable change until the morning of the 22nd, was the first change I noticed. It rained all night the 21st. ON THE MORNING OF THE 22ND IT WAS MORE LIKE AN OCEAN THAN A RIVER THEN."

David Shore, superintendent of the appellant company at Ariel dam gives ample confirmation of the above testimony despite his evident reluctance to testify in plaintiff's behalf (Tr., 141): "As to how we closed the gates on the 22nd, on Friday, starting at 2 o'clock, this chart shows Nos. 1, 2, 3 and 4 up 25 feet; No. 5 up 15 feet; that was midnight, WE DID NOT START TO CLOSE THEM UNTIL THE

NEXT DAY AT TWO; THAT IS FRIDAY AFTERNOON."

This statement by Shore, coupled with the great drop in the elevation of the lake shown to have taken place in Exhibit No. 13 between midnight and 2 P. M., Friday, December 22nd, amply sustains the plaintiff's contention that the appellant's negligence was responsible for the damage to his property. The testimony continues—

FAY GRIEGER, PLAINTIFF, TESTIFIED (Tr., 156): "In the early part of December, 1933, I was home on the place, I was down near the river off and on (Tr., 157) all of the time during the month of December. As to what would take me down there,—well, we got our cows, and I went along the river bank practically every day, going to town and back. I observed the condition of the weather in regard to moisture. It was raining quite a lot during that time; sometimes it would rain quite heavy. The temperature was very warm for that time of the year; it was warm enough to melt the snow on the high places; there was no snow that could be seen on the high hills there. I observed the condition of the height of the river along about the 10th of the month. The river at that time was fairly high, and some water had backed in over my place at one time. It did not stay there but a little while at that time, and it went over the road on one place down about three and a

half miles down the road. As to whether its height increased from day to day along up until the 20th of the month,—well, that was the only high water we had between those dates. It kept on raining between the 10th and 20th; it rained quite a lot then and was warm, and there was hardly any water coming down the river at all then. I noticed the condition of the river on the 19th. On the 18th the water was down. It had not come up very much then. On the 19th the water had raised quite a little, and it went over the road in a couple of places; and then it dropped back down some. It went over the county road one place about a half a mile from Woodland, and the other place was (Tr., 158) around a mile and a half below me towards Woodland on the Clark County side. On the 19th it was up. On the 20th it was about the same height, and on the 21st it came up quite a lot on that day. I observed it first in the morning; it was up further than it had been any time during that week.

Up until the 21st the current had been running out in the channel more. There was some water over part of the ground at that time, but the current was way out in the channel of the river. Prior to the 20th it was not cutting away any of my land. I did not at any time observe the current cutting away any of my land up to the 21st; I noticed it on the 22nd. We stood

on the hill above the water, and we could see it taking the trees which was down on the northeast corner. It would take out trees right along there. Then farther up we could see some of the soil going there. It was warm there. I saw the waters subside on Friday; on Friday afternoon (December 22nd) it dropped some, from practically 2 or 3 o'clock it dropped quite a little. I saw it wash practically two channels through the land at that time; you couldn't see clearly then yet."

Reviewing the evidence, it is clearly evident that during the month of December, 1933, and particularly from the 5th to the 22nd of December, 1933, the Lewis River basin was visited with heavy rains, and periods of warm weather, sufficiently warm to melt snow on the hills; that in spite of the turbulent history of the Lewis River, and in spite of the fact that conditions indicated impending flood conditions, the company kept backing up the Lewis River behind its dam, increased its storage and raised the elevation of its reservoir to more than 237 feet. In spite of heavy rains and tremendous volumes of water flowing into the river from its tributaries, the river below the dam was kept at a low stage for several days prior to the tragic and abrupt release of waters at 12:16 A.M., December 22nd, 1933. It appears that at about midnight, the beginning of December 22nd, the flood stage reached its peak. The power company's superin-

tendent then called his seven men together and they decided to open everything and abandon the plant (Tr., 132). This was promptly done, resulting in the releasing of a tremendous volume of storage water in addition to the natural flow of stream, while it was running at flood stage. The destruction which was wrought by these acts are evidenced by the testimony of witnesses and the exhibits previously referred to. While the river at Mr. Grieger's property was high during December 21st, the evidence shows that the cuting away of his soil was concurrent in time with the release of storage waters from Lake Merwin. Several witnesses testified to the great acceleration of the stream flow shortly after midnight December 22nd. The gauging station located below the dam had been destroyed, consequently no continuous record of the volume of flow is available, however, it was estimated by the United States Geological Survey that the flow reached a peak of 129,000 feet per second. The estimate is not challenged by either party. It is obvious that upon opening the gates with the elevation of the lake standing at 237.6, the greatest on-rush of water must have occurred at that time.

After the elevation of the lake started to drop, of course, there would be a corresponding decrease in the volume of flow. Exhibits No. 13 and 10 taken together would indicate that shortly after midnight of December 22nd, 1933, the natural flow of the stream was accelerated by more than 60 per

cent, and that the percentage of acceleration began to diminish continuously until the lake level again became constant.

Appellant's counsel have attempted to show a small percentage of mean acceleration over a long period. Perhaps they could do better by taking the average percentage for a week or a month, or better still, wait until such time that they could again build up their lake elevation to 237.5 feet. Then the average discharge would equal the average flow of the stream.

The evidence shows that upon the operation of the flood gates at midnight, December 22nd, the powerhouse was swamped with water, the machinery was put out of operation, and the flood gates all remained wide open for 14 hours, until the company could bring in a new power line and obtain an outside source of power to operate its gates (Tr., 86-87).

Mr. Shore emphatically testified that the gates may be operated manually (Tr., 86-124) but no explanation was made as to why they were not so operated, nor why the lake elevation was permitted to drop continuously until such time as a source of power was available for the closing of the gates.

> MR. SHORE FURTHER TESTIFIED: (Tr., 130) "All of the water which comes out of the Lewis River in the vicinity of Woodland has necessarily to come by the channel and the

property of Mr. Grieger, the plaintiff in this action."

The respondents, plaintiffs in the court below, were in a position where they were compelled to call as witnesses in their behalf, a number of employees of the appellant company. They were naturally reluctant to testify for plaintiff, but in spite of that fact, the record shows the cause and the effect of the tremendous discharge of impounded waters.

REGARDING THE EFFECT OF THE FLOOD UPON PLAINTIFF'S PROPERTY, MR. PHILLIPS TESTIFIED: (Tr., 70) "The morning of the 22nd, I would say, was the first I noticed the river begin to cut. The Grieger property was just washing away. It had just simply cut everything—it looked to be down about 8 to 10 or 12 feet. It washed down to gravel or bedrock. I would call the soil on that place a silty loam. I am not a land expert. The silty loam washed away. I could not say exactly how many acres of it were washed away. I should judge 50 or 60 acres probably."

MR. GRIEGER TESTIFIED: (Tr., 158) "Until Saturday we couldn't tell much about it, but as the water went down further, then we could see the extent of the wash it had made there. It subsequently dried off. Where we had our farm land, and which had been fenced in by woven wire fence, we found that we had no

soil at all. It was washed clear to the gravel in there, and up further to the (Tr., 159) south it had cut or washed out chasms at two or three different places there. It hadn't washed quite as deep there, but in different places it cut up the land quite a lot there.

These pictures handed me, which are marked plaintiff's Exhibit 1 to 7, were taken on my property. I saw them taken. I was down there when they were taken; in fact, I am in three of the pictures. The man standing along the bank in three of these pictures is myself. Prior to the flood the condition of the soil where I am standing was level soil. When the river was at normal flow I would judge it was 10 or 11 feet above the river. Now it is probably a foot, or a foot and a half, above the river. If the water comes up any at all it will use it as a channel. The soil in there was silty loam; the best soil I had. I haven't found anything that anyone would now recommend raising on it. That is the place where it is worn down clear to the gravel. Driftwood was throwed up all over the place there. In one drift pile we counted 21 trees; they were all sizes anywhere from four inches up to a foot and a half through. There were three or four big cottonwood trees washed in there. Three of them is still on the place there. One was washed up on top of two apple trees there, and was resting there after

the flood, and two of them are laying up on a big sand pile there. There is some stumps washed in there also. Sand was washed in all over the place. Some of the piles of sand is as deep as (Tr., 160) five and six feet high; anywhere from six inches up to six feet; most of it is a coarse sand. Once in a while you will find a little finer sand with so silt or anything in it. It is not capable of producing anything. It is a detriment to the soil because you can't raise anything on it. It has the soil covered up, and stuff couldn't grow through it at all.

Approximately around 45 acres of my land was washed away, and I would judge in the neighborhood of 30 or 35 acres of it was covered with sand. As to whether that that has the sand on is used for any purpose,—the cows run over it once in a while, but nothing will grow on it.

There wasn't any side of fences left. We found part of the woven wire fence, maybe two hundred feet of it, piled up in the driftwood. We couldn't ever find any of the rest of the woven wire fence at all, and we found maybe one or two of the barbed wires and the cross fences. I had just finished the woven wire fence in June before the flood; there was around 120 rods of it. They were new posts; we put new cedar posts in the whole fence. A cedar post is supposed to be the best type outside of steel

posts. We figure the cost of putting in the fence, and the material, and everything in the amount of about $450.00.

We had oats and vetch at that time, for hay, that we would have harvested the next year, and we had a small crop of clover on the place; there was in the neighborhood of 34 or 35 acres. The reasonable (Tr., 161) value of the crop would be in the neighborhood of $800 or $900 when it was harvested. There was some timber on the premises; some fir and some cedar, and here and there was cottonwood scattered through, small trees, a lot of it washed out there. The reasonable value of the timber that I lost was in the neighborhood of $200.00.

Exhibit No. 17 for identification, which you hand me, I recognize as one that was taken under my direction. That depicts the type of sand that is on the place. That sand washed in there during the night of the 21st and the day of the 22nd.

(Thereupon Exhibit No. 17 for identification, a picture showing sand on plaintiff's premises, was admitted in evidence, and marked Plaintiff's Exhibit 17.)

"Exhibit 17 was not taken on the part of my land that was washed away; that is some of the land with the sand piled on it. Right in back of that mound, right back of me, is a pile

of sand. There is a log and a stump laying right there where I am standing; that is sand.

I have prepared a sort of sketch of my place; it shows the section where it was damaged,—well it shows the whole—I made a sketch of the whole place from the county road back to the river. It shows an outline of the land, and I tried to show where the ground washed out there. I will try to show the way my place lays with reference to the river (Tr., 126). The sketch shows the turn of the river and the channel of the river before the flood. It shows the lands have been cut into. This map isn't drawn to scale; it is a sketch. The boundaries of the land is defined there. I didn't have any survey or any measurements made as to the actual quantity of land washed over; I didn't have the means and so forth to make that. I think your company has one that they have made."

REGARDING THE VALUE OF PLAINTIFF'S LAND BEFORE AND AFTER THE FLOOD MR. GRIEGER TESTIFIED: (Tr., 156) "I judged the reasonable market value of such land as mine with the buildings on it in the year 1933 was in the neighborhood of $22,000. I know the value of other lands in the neighborhood of the same kind, by the acre, regardless of buildings. Some of the land was valued around $200.00."

(Tr., 165) "I know the reasonable market

value of the place after the flood. It is just a place to live. I don't know that you would get anybody to buy it. I wouldn't judge it would be worth over $1,000.00 or $2,000.00. About the only value you would get out of it would be in the lumber of the buildings."

ON THE QUESTION OF THE VALUE OF PLAINTIFF'S LAND, MR. INSULL TESTIFIED: (Tr., 63) "I know the reasonable value of the type of land owned by Mr. and Mrs. Grieger in the month of December, 1933. I know the type of buildings that were on Mr. Grieger's place. I know the value of the entire property of the farm prior to the flood (Tr., 65). As to my opinion of the reasonable market value of the Grieger place prior to the flood of 1933 —land of that type was worth at least $250.00 to $300.00 an acre. I have seen the land since the flood. The place is almost washed away. The buildings is there on some high banks, the lands on that place were mostly low bottom land."

REFERRING TO EXHIBITS NO. 1 and 7, MR. INSULL TESTIFIED: (Tr., 66) "Those photographs correctly describe the land that has been affected by the water. I know the reasonable market value of the Grieger place after the flood. As to the reasonable market value of this place, there is no value of any kind of land today, not my place or anybody else's,

no value after the flood. I cannot give it away, my place."

## POINTS, AUTHORITIES AND ARGUMENTS

### Point I.

No fact tried by a jury shall be otherwise re-examined in this Court unless the Court can affirmatively say that there is no substantial evidence to support the verdict.

U.S.C.A., Title 28, Sec. 879.
Herencia v. Guzman, 219 U. S. 44.
Commercial Travellers Mutual Acc. Ass'n of America v. Fulton, 93 Fed. 621.
Humes v. United States, 170 U. S. 210.
Lehigh Valley R. Co. v. State of Russia, 21 Fed. (2d) 406. Cert. denied 48 S. Ct. 159.

### ARGUMENT

We presume that we are not required to elaborate to any great length on the authorities in support of this point. The rule that questions of fact tried by a jury are not to be re-tried on appeal and that a verdict shall not be disturbed, where it is supported by any substantial evidence, that all reasonable inferences must be resolved in favor of the respondent, is a rule upon which all the authorities are in agreement.

In the case of Herencia v. Guzman, 219 U. S. 44, the Court said:

> "The argument on behalf of the plaintiff in error proceeds upon the assumption that this Court may review the evidence as to negligence and as to the damages recoverable, and may reverse the judgment if the Court is dissatisfied with the findings of the jury. This, however, is not the province of the Court upon writ of error. As there was evidence proper for the consideration of the jury, the objection that the verdict was against the weight of evidence or that the damages allowed were excessive cannot be considered."

In the case of Lehigh Valley R. Co. v. State of Russia, 21 Fed. (2d) 406, the Court held:

> "There was evidence of negligence on the part of the railroad company which required the trial judge to submit questions to the jury for their determination. We cannot weigh the sufficiency of that evidence."

In the case of Commercial Travelers Mutual Acc. Ass'n of America v. Fulton, 93 Fed. 621; the plaintiff sought to recover on an accident policy. The evidence showed that the insured suddenly fell, striking a water spout, which left external marks on his head and that he died a few minutes thereafter. It appeared that deceased was troubled with disease of the heart. The primary question in the case was whether the fall produced the effect on the brain that he died in consequence of the blow so received, or whether the fall caused his death only by producing such an acute aggravation of the disease of his heart that he died, when a man with a reasonably healthy heart would have lived.

In commenting upon the evidence, the Court said:

> "That we may be inclined to a conclusion thereon differing from that expressed by the jury in their verdict, is no ground for disturbing their verdict if there can be found anywhere in the record, evidence sufficient to warrant the Court sending the case to the jury."

In the case of Humes v. United States, 170 U. S. 210, the Court said:

> "The alleged fact that the verdict was against the weight of evidence, we are precluded from considering, if there was any evidence proper to go to the jury in support of the verdict."

We submit that in the case at bar, the question of defendants' negligence, and the proximate cause of the injury, as well as the extent of damages, was submitted to the jury. A review of the evidence will disclose that the verdict is not only based on some evidence which would be sufficient here, but that the evidence is so clear, convincing and conclusive that a fair-minded jury could not have found otherwise.

**Point II.**

One who maintains an obstruction over a natural water course is required to use reasonable care to the end that it does not damage those who may lawfully be found in the course of any waters that are intentionally or incidentally impounded.

> O. W. R. & N. Co. v. Williams (C.C.A., 9th Cir.) 268 Fed. 56.

Dahlgren v. Chicago M. & St. P. Ry. Co., 85 Wash. 395; 148 Pac. 567.
Ryland v. Fletcher (1868) L. R. 3, H. L. 330.
Crawford v. Cobbs & Mitchell Co., 121 Or. 628; 257 Pac. 16.
Allen v. K. P. Timber Co. (Dec., 1935) Or. Advance Sheets, Vol. 22, p. 653.

## ARGUMENT

All the law which forms the basis of appellee's cause of action may fairly be said to be included in the statement of this point.

At common law the rule was much more stringent and many early common law cases followed the English case of Rylands v. Fletcher (1868) L. R. 3, H. L. 330, in holding that one who for his own convenience so dealt with the normal flow of the waters of a stream so as to cause them to be impounded and then discharged in a dangerous accumulation was liable PER SE, regardless of negligence, for the resultant damage. A careful examination of the reasoning supporting the English opinion and a tracing of the rules of the common law result in the conclusion that the doctrine is still the law. It is well founded in reason and in justice. It is based upon the theory that whoever interferes with the flow of a stream ought to insure those who may lawfully be in the path of the stream against damage from the interference.

We do not, however, desire to develop the logic or historical foundation of this rule, inasmuch as we

did not rely upon it, but permitted appellant to try the case upon its own theory of the law. We do not need the full force of this rule inasmuch as the evidence of negligence was clear and convincing. The most that can be claimed in appellant's behalf, the most that was claimed at the trial, or is claimed here is in this point of law, as set out above. It answers all of the major part of appellant's brief.

The statement of facts in this brief has been made rather long, because we believe that the very statement of the testimony itself is sufficient argument upon the facts of the case.

The history of the Lewis River is a turbulent one. The streams in that vicinity had been raging for several days before the final catastrophe. For many days the power company had impounded flood waters, stored it up to a great and unusual elevation. As the heavy rains and the warm weather of December, 1933, brought down great volumes of water, the defendant company simply ignored what would have served as a warning to any sensible person, or even slightly careful person, that there was impending disaster ahead unless the flood waters were permitted to escape. Their negligence in storing such large amount of flood waters is overshadowed by their grossly negligent act in suddenly releasing the storage waters, opening everything wide open and abandoning the plant, leaving the lower riparian owners at the mercy of a disastrous flood, in the middle of the night and without any warning.

At the trial, defendants made no effort whatsoever to excuse their conduct in releasing the stored-up waters. They did not call a single witness.

**Point III.**

The question whether the flood conditions complained of were an Act of God was one for the jury. Under the law even if the flood conditions of the river were of such major proportions as to constitute an Act of God, if negligence of appellant concurred with the unusual flood conditions to produce the injury to plaintiff's property, appellant is yet liable.

Eikland v. Casey, 290 F. 880.
Crawford v. Cobbs & Mitchell Co., 121 Or. 628, 253 Pac. 16.
Kuhins v. Lewis River Boom & Logging Co., 51 Wash. 196; 98 Pac. 655.
Williams v. Columbus Pro. Co., W. Va. 683; 93 S.E. 809; L.R.A. 1918 B 179.
Lyons v. Chi. M. & St. P. Ry. Co., 45 Mont. 33; 121 Pac. 886.

**ARGUMENT**

We have pointed out, that the evidence showed unusual rainfall and flood conditions in the Lewis River basin during the month of December, 1933. Notwithstanding the unusual heavy rainfall, no injury occurred to plaintiffs' land and the river did not reach a danger point at any time until the impounded waters of Lake Merwin were abruptly re-

leased. Unquestionably a large portion of the flood waters which raged over plaintiffs' property during the early hours of December 22, 1933, was storage water which had been impounded by the appellant's dam.

The whole doctrine of immunity from the results of Acts of God is predicated upon the proposition that they are so sudden that man cannot foresee them or guard against their consequences. There is no authority nor any case in the books which excuses the wrongdoer from the results of his negligence upon the ground that an Act of God concurred with his negligence to cause the damage.

In the case of Eikland v. Casey, 290 F. 880, this Court said:

> "Evidence which does not prove that flooding of plaintiffs' land was so far due to natural causes directly and exclusively without human intervention, that it could not have been prevented by any amount of foresight and care reasonably to have been expected of the defendants, is insufficient, as a matter of law, to show that the flooding was due to the Act of God."

We do not concede that any Act of God, as legally defined, was present in the situation which resulted in this disaster, but even if an Act of God were shown, there certainly was an abundance of evidence that it was not the proximate cause of the injury complained of, but that the proximate cause of the injury was the impounding and abrupt release of flood waters.

In the case at bar, the matter was submitted to the jury. We confidently submit that not only was it a proper question for the jury, but no fair triers of fact could have reached a different conclusion than the jury did.

The uncontradicted evidence shows that the cutting away of plaintiffs' land did not occur until after midnight of December 22, and that the destruction of plaintiffs' property was concurrent in time with the release of the impounded waters of Lake Merwin.

This case differs from some of the cases cited by the authorities in these important particulars:

In the case at bar, the flood followed the deliberate opening of the gates. The negligence of the appellant arises from its deliberate act and its abandonment of the dam property, with the resultant lowering of the lake and the discharge of this tremendous volume of water with the channel of the stream to the damage of the plaintiff. There was no question as to whether or not the consequences could have been foreseen. The consequences were apparent. The volume of excess water loosed by the defendants in opening their flood gates and keeping them open was the proximate cause of the damage complained of.

## Point IV.

**None of the appellant's assignments of error are well taken.**

Arkansas Power & Light Co. v. Beauchamp et al., 43 S.W. (2d) 234.

## ARGUMENT

Appellant's assignments of error so far overlap each other as to make it impractical to discuss each as a separate legal proposition. Once the facts of this case and the law as declared by prior decisions of this Court are understood, the assignments are entirely disposed of. The evidence is clear, convincing and conclusive that shortly after midnight, on December 22nd, 1933, the Defendant Company opened their flood gates, wide open, and abandoned their plant. It clearly appears that the power house flood gates and spillways are so constructed that if the gates are all opened when the elevation of the lake is at a high stage, the power house will be swamped with water and put out of commission.

This apparently would be true, regardless of the volume of flow in the stream. By virtue of the fact that the Defendant Company failed to close their gates and arrest the rapid discharge of storage waters, until such time as they were able to obtain outside source of power to operate the flood gates, clearly gives rise to an inference that they were unable to close their gates manually. No other explanation has been made or offered, as to why the Power Company did not attempt to check the tremendous discharge of water and the resultant damage to the plaintiffs.

Exhibit No. A-2 is offered by the appellants in an attempt to show the operation of the gates. It is a company log made by and kept in the company's control at all times and is not submitted to the United States Geological Survey, nor is it a record required under the rules of the Federal Power Commission. In this respect it differs from Exhibits Nos. 10 and 13. We are mindful of the fact that Exhibit A-2 was a bit of evidence which the jury could weigh and attribute whatever significance and credence to, as in their judgment it was worth.

Appellant contends 1st—that there is no evidence to support the verdict. In reply to this contention we point first to Exhibit No. 13. This is a chart made by an automatic stage recorder, which was located in the fore-bay immediately behind the dam structure on the upstream side, and provides continuous history of the rise and fall in the elevation of Lake Merwin at the time this controversy arose.

The vertical lines are so spaced that the space between one line and the next represent a period of two hours. The horizontal lines are so spaced that the space between one to the next represent a difference of six inches in the elevation of the surface of the lake. The exhibit shows that prior to the gigantic release of flood waters, the waters were stored up to an elevation of upward of 237.6 feet.

It is admitted that all of the gates were in a wide open position shortly after midnight December 22nd. Viewing the exhibit it is clearly evident that during

the first 30 minutes after the release, the elevation of the lake dropped six inches. Following the graphic line, it appears that at 10:00 A.M. the elevation of the lake had dropped 2.1 feet and still continuing to drop until in the space of 24 hours the lake was lowered approximately four feet. It is admitted that the lake covers an area of 4,000 acres. Therefore, the volume of water discharged in excess of the natural flow of the stream is not a matter of guesswork or speculation. It is a matter of simple arithmetic, and is clear and convincing.

That the discharge of waters reach a peak of 129,000 cubic feet per second, shortly after midnight is evidenced by Exhibit No. 10 and is not disputed. Again it becomes a matter of simple arithmetic. The amount of acceleration is readily computed and understood by any reasonably intelligent juror.

Mr. Insull, Mr. Miles and other witnesses testified to the visitation of heavy rains and warm weather, in the Lewis River basin in the month of December, 1933, to the storage of flood waters and to the fact that in spite of heavy rains, the river was at low stage for several days prior to the release of the impounded waters. There was conflicting evidence with regard to the position of the gates. Mr. Miles testified (Tr. 115-116), that he was up at the dam and observed the position of the gates on the 20th and 21st of December; that on December 20th, gate No. 1 was up about 10 feet, and No. 2 was out

6 or 8 feet, but the others were tight. On December 21st the gates were about the same as the day before.

This evidence is in direct conflict with Exhibit A-2 offered by appellant. This matter resolved itself into a question of fact for the jury to determine.

Mr. Insull testified, and his testimony is not disputed, that the gigantic flood stage occurred shortly after midnight on the morning of December 22nd.

In view of the tremendous on-rush of water occurring shortly after midnight begining December 22nd, when the power plant was abandoned by the crew, and in view of the abrupt drop in the lake elevation, the jury may have given but little credence to Exhibit A-2 which was offered by the defendant company. In any event the fact that no effort was made to check the discharge of storage waters stands as mute evidence of appellant's negligence, if not of culpable disregard of down-river residents.

Appellant contends that any verdict rendered on the evidence would be purely speculative. Referring to the record and particularly to the testimony of Mr. Phillips and Mr. Grieger with regard to the effect of the rush of water. Mr. Phillips testified (Tr., 70):

> "The river was the same after the 20th—the 21st. I did not notice any noticeable change until the morning of the 22nd, was the first change that I noticed. It raised all right on the 21st,

on the morning of the 22nd it was more like an ocean than a river, then.

"The morning of the 22nd, I would say, was the first I noticed the river begin to cut. It just simply cut everything—cut the whole place and washed away down—it looked to be down about 8 or 10 or 12 feet. It washed down to gravel or bedrock."

Mr. Grieger testified (Tr., 158):

"I did not at any time observe the current cutting away any of my land up to the 21st; I noticed it on the 22nd. We stood on the hill above the water, and we could see it taking the trees which was down on the northeast corner. I saw it wash out practically two channels through the land at the time." (Tr., 160).

"Approximately around 45 acres of my land was washed away, and I should judge in the neighborhood of 30 or 35 acres of it was covered with sand."

The evidence shows conclusively that the destruction wrought was concurrent in time with the release of storage water. Hence, the only reasonable inference which could be drawn from such a set of facts is that the sharp release of storage waters so accelerated the flow of the stream that it simply swamped everything in its wake. Quoting from appellant's brief (page 64):

> "The real issue, as shown by authorities in this brief, is whether appellees' damage was caused wholly by the natural flood flow of the stream, or partly by such natural flow and partly by acts or defaults of appellant, within the allegations and proofs, and if the latter be established, then whether such acts or defaults constituting negligence, having in mind further, what a reasonably prudent man, informed as to the habits of the stream and taking all factors into consideration would have done under like circumstances."

We have no quarrel with that statement of the issue. In fact, that issue was submitted to the jury and thereupon the jury found for appellees (plaintiffs). (See instructions.)

The case of Arkansas Power and Light Company vs. Beauchamp et al., 43 S.W. (2d) 234 (1931), is a case which arose out of a situation substantially the same as the case at bar.

The Arkansas Power and Light Company built a power dam called the Remmel Dam across the Ouachita River, by which a reservoir known as the Lake Catherine was created covering an area of approximately 3,000 acres. The plaintiffs in that case owned and operated some small farms lying adjacent to the Ouachita River about 10 to 14 miles below the Remmel Dam. A few days prior to October 7, 1930, heavy rainfall commenced in the watershed of the Ouachita River. On October 7, 1930,

a part of these farms were overflowed, and the crops thereon were destroyed. The plaintiffs brought suit against the company to recover damages for the destruction of the crops on the ground that the same was occasioned by the negligent operation of the flood gates of the Remmel Dam by which a volume of water was suddenly released from the reservoir above into the stream below in such quantities as to cause the overflow and damage. At the trial of the issue a verdict was rendered for the plaintiffs.

The principal question raised and argued upon appeal was the sufficiency of the evidence; the contention being that there was no competent evidence of a substantial nature to support the verdict.

The Remmel Dam was so constructed as to impound the waters of the Ouachita River and raise them to a certain height and then permit the ordinary flow of the river to pass over the dam to the river below. The dam was constructed with 12 openings each 27½ feet wide and 18 feet deep called flood gates. These gates were for the purpose of letting the excess waters through in times of flood. The gates were so arranged that they might be raised any desired height at the will of the person in charge of the dam. The testimony of the witnesses for the company tended to prove that the flood gates were properly operated. Indeed, there was evidence sufficient to have warranted a verdict for the company IF it had been accepted by the

jury. In that case the Court said:

> "Since this testimony was not accepted by the jury, it becomes important to review the circumstances as appears in the evidence tending to contradict that testimony and to refute the contention made by appellant."

The circumstances which the testimony tended to establish were as follows: On the vicinity of the Remmel Dam there had been a severe drought prior to October 5th and the river was extremely low. Then a heavy rain began falling on the afternoon of October 5th and continuing until October 7th. At this time the waters began to pile up and the flood gates of Remmel Dam were begun to be opened, raising the water in the river and flooding the lands below. The water which came down then was clear as spring water. In commenting upon the evidence the court said:

> "It is common knowledge that water in a lake becomes clear. These circumstances warranted the inference that the water came from Lake Catherine and that the flood gates had been opened negligently, and the jury were justified in the conclusion that the appellant then opened the flood gates more than was necessary and to such an extent that the flood resulted."

> "It is elementary law that any fact at issue may be proven by circumstantial evidence."

It is a matter of common knowledge, that a large volume of water suddenly released becomes a competent agent of destruction. A jury does not need the aid of an expert to understand this. In the case at bar, the evidence of tremendous acceleration is clear, and gives rise to the strongest inference, particularly when it is proved that the destruction was concurrent in time with the release of storage waters.

The evidence shows the channel of the Lewis River was sufficient to carry the natural flow of the stream at all times, without causing any damage to plaintiffs' property. On the 21st day of December the record shows an average flow of more than 84,000 cubic feet per second, which would of course indicate that the maximum flow for that day would be something more than that figure. Mr. Phillips and Mr. Grieger both testified that appellees' (plaintiffs') property was not damaged until December 22nd when the lake level was lowered by releasing storage waters which greatly accelerated volume and velocity of the flow. The record bears ample evidence to show that at a time when the river was at a flood stage such as to endanger the lower riparian owners, the appellant (defendant) loosed a tremendous force and abandoned its plant, leaving plaintiffs helpless in the wake of destructive forces.

On page 51 of appellant's brief, we find the following language:

> "It would be inferred from examination of Exhibit No. 13 that upon completing the opening of No. 5 gate, the lake level dropped a half foot in 16 minutes, implying a discharge of 2,000 acre feet during that period."

In so many words appellant admits the rise of inferential evidence, and attempts to supply "evidence" to the effect that the opening of gate No. 5 had some disturbing effect upon the mechanism of the recording gauge.

No such explanation, however, was offered to the jury, nor does appellant attempt to show that if the opening of gate No. 5 affects the gauging mechanism, why the closing of the same should not have -a -corresponding effect upon the gauging mechanism.

In this connection the testimony of Superintendent Shore is interesting. He testified (Tr., 87):

> "The elevation dropped during the period that the gates were all opened. I don't remember exactly how much until we get this government chart. I would say in the course of it, maybe hours to go a foot, maybe, or two foot, something like that, BUT THOSE CAN ALL BE GOTTEN OFF THESE GOVERNMENT RECORDS. THAT WILL SHOW THE DROP EXACTLY FROM THE TIME IT REACHED THE CREST UNTIL IT WENT DOWN."

In other words, Mr. Shore admits that the Exhi-

bit No. 13 shows exactly what happened to the lake level.

Referring to the appendix of appellant's brief, table No. 1, it appears that they have prepared a record of considerable volume, but have conveniently omitted the record for that period of time over which this controversy arose, namely from 12:16 A.M. to 2:00 P.M. Friday, December 22nd, 1933.

We shall attempt to supply that omission, compiling our data from Exhibit No. 13.

**RECORD OF DECEMBER 22ND, 1933—**
**12:16 A.M. to 2:00 P.M.**

| Date | Hour | Lake Elevation Exhibit No. | Approximate amount of spill —sec. ft. |
|---|---|---|---|
| Friday, | 12:16 A.M. | 237.6 | 129,000 |
| December | 12:46 A.M. | 237 | |
| 22, 1933 | 2:00 A.M. | 236.8 | Diminishing |
| | 4:00 A.M. | 236.5 | spills* |
| | 6:00 A.M. | 236.1 | |
| | 8:00 A.M. | 235.8 | |
| | 10:00 A.M. | 235.5 | |
| | 12:00 Noon | 235.2 | |
| | 2:00 P.M. | 234.9 | 112,600 |

*Note: The volume of spill would of course diminish as the elevation of the lake was lowered.

The record is clear on the two major points in this case. The evidence shows that at the time in question, the appellant company released great quantities of storage waters, and concurrent there-

with the property of appellees was damaged by the waters so released. As to the handling of the flood gates and their positions at various times, there is a conflict of evidence between Mr. Miles' testimony and Exhibit A-2 which resolved itself into a question of fact for the determination of the jury.

In any event, the evidence shows that the gates were so handled by appellant that 16,000 acre feet of storage water was dumped upon the lower riparian owners, including appellees, in a short space of time while the natural flow of the stream was at a high stage.

## CONCLUSION

A careful perusal of appellant's brief has drawn the undersigned forcibly to the conviction that the appellants base their hope for reversal, not upon any lack of substantial evidence in the record to sustain the jury's verdict, but rather upon THEIR con cept of the weight of the evidence. With commendable zeal for the cause of their client, counsel have hoped that this Court might agree with them in the belief that the jury would better have found for the appellant than for the plaintiff. Unfortunately the jury saw the evidence with an eye uncolored by the partisanship of counsel for the appellant. Whether the jury was unwise or not is for no one to say. We are convinced that this Court has no intention of trying the case over again and handing down a

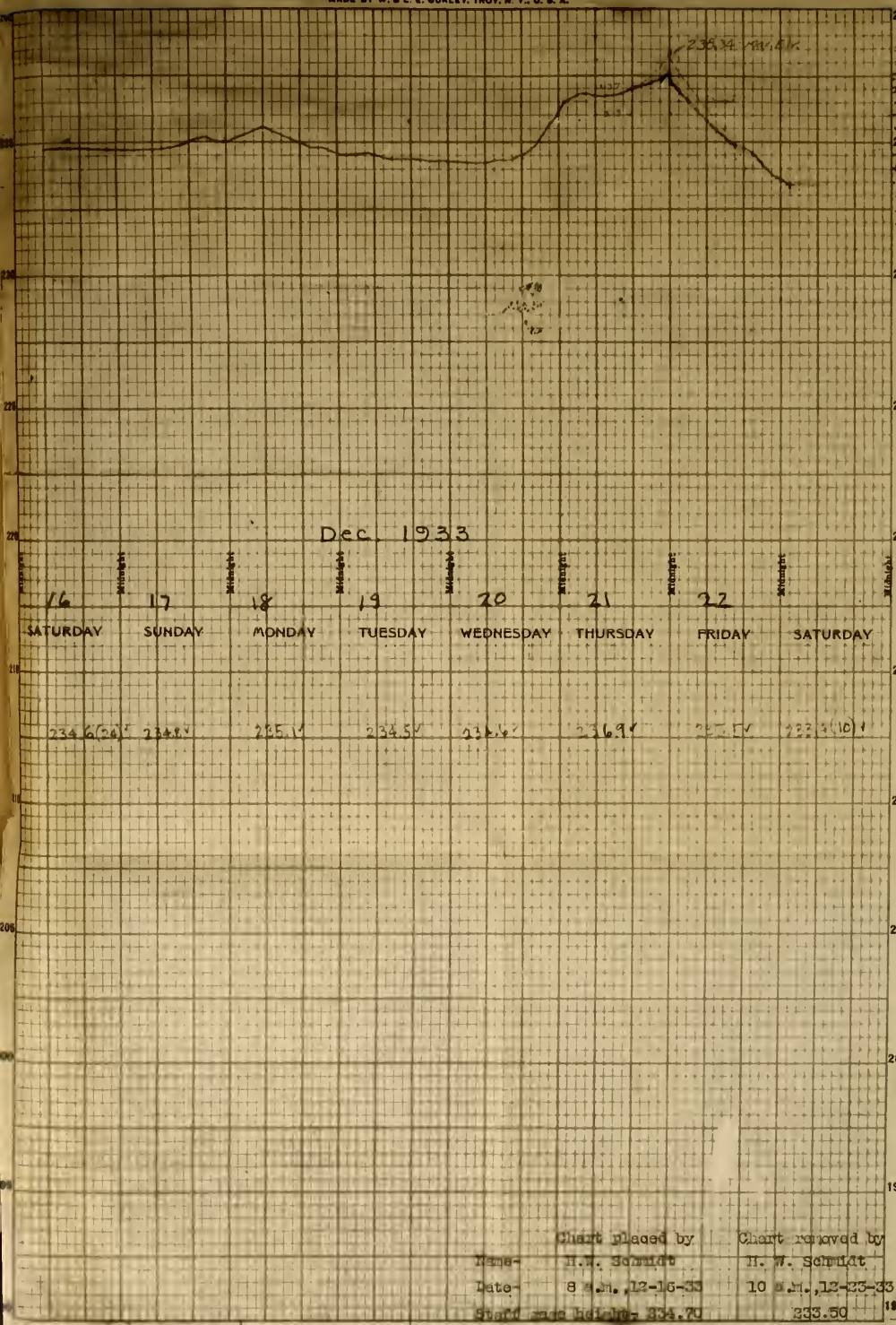
verdict more in conformity with appellant's belief, than was the jury's verdict below.

Respectfully submitted,

WM. P. LORD,
GROSS & ANDERSON,
Harry L. Gross
Ben Anderson
Attorneys for Appellees.

CHART FOR GURLEY GRAPHIC RECORDER

MADE BY W. & L. E. GURLEY, TROY, N. Y., U. S. A.




| | Chart placed by | Chart removed by |
|---|---|---|
| Name- | H.W. Schmidt | H. W. Schmidt |
| Date- | 8 a.m. 12-16-33 | 10 a.m. 12-23-33 |
| Staff gage height- | 234.70 | 233.50 |

LOCATION Lake Merwin near Ariel, Wash.
RESERVOIR LEVEL
GAGE

Time: 1 Week
Range: 190 to 240 ft.
Scale: 12" = 50 Ft.

| CHART PLACED BY | CHART REMOVED BY |
|---|---|
| Name H W Schmidt | Name H W Schmidt |
| 8 (hour) 12 (month) 16 (day) 33 (year) | 10 (hour) 12 (month) 23 (day) 33 (year) |
| Staff gage height 234.70 | Staff gage height 233.50 |

No. 8130

# United States
# Circuit Court of Appeals
## For the Ninth Circuit.

INLAND POWER AND LIGHT COMPANY,
a corporation,

Appellant,

vs.

FAY M. GRIEGER and MARY LOIS GRIEGER,

Appellees.

# Appellant's Reply Brief

**Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.**

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No. 8130

# United States
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Appellees.

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# Appellant's Reply Brief

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**Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.**

## APPELLANT'S REPLY BRIEF

### Explanatory Note

Upon checking the exhibits in the clerk's office we find that in appellant's opening brief we confused, and in all our references reversed, the official numbering of exhibits 9 and 13. This error arose from our lack of access to the original exhibits at the time that brief was written, and from the fact that the witness Calkins referred to "Exhibit 9" as "a record of the gauge height of Lake Merwin Reservoir, *taken at the dam*". (Tr. 91). We assumed from his language that he was referring to the chart of the Gurley Graphic Recorder, which is recorded at the dam. Mr. Calkins, however, was apparently referring to the computations made in his office from the Gurley Graphic Recorder weekly charts. If the Court, in considering the briefs of both parties, will kindly, for reference purposes, renumber Exhibit 9 as Number 13, and Exhibit 13 as Number 9, confusion will be avoided. We regret the mistake, and appreciate opposing counsel's cooperation in maintaining our numbering of these two exhibits in their brief. To avoid further confusion we are maintaining the same reversed numbering of these two exhibits in this reply brief.

## ARGUMENT

In answering appellees' brief we shall limit ourselves to pointing out certain gross inaccuracies in their counsel's statements regarding the evidence, and will also undertake to show the fallacious character of some of

their computations of the quantities of water discharged through the gates of the dam at certain times.

Before analyzing appellees' computations of the quantity of water which they claim passed through the gates of the Ariel dam on the night of the peak of the flood, we will discuss the testimony which appellees assert supports the verdict.

**Discussion of appellees' statement of the rule that this Court will not disturb a jury's verdict if there is any substantial evidence to support it.**

**(Appellees' brief, page 22.)**

At page 22 of appellees' brief cases are cited in support of the general principle that this Court will not "weigh" the evidence, but must sustain the verdict if there is any *substantial* evidence to support it, and that this Court's decision must be based upon a consideration of the evidence most favorable to appellees' cause. We take no issue with that general statement of the applicable law, but maintain, and will undertake to show, that the testimony relied on by appellees as supporting the verdict fails to prove any facts showing negligence or from which negligence might properly be inferred. In considering the sufficiency or insufficiency of the evidence it is important to remember, as held in *Stinson v. Business Men's Accident Association,* 43 F. (2d) 312, at 314 (C. C. A. 10th; 1930), that whether a judgment is sustained by any substantial evidence is a question of law for the court.

**The evidence relied on by appellees in their Statement of the Case (appellees' brief, pp. 3-22) is insufficient to sustain the verdict.**

We will first examine the testimony of Frank Hastings Miles, quoted in part at pages 8 to 9 of appellees' brief. After stating that December, 1933, was very rainy, as to which there is no dispute, this witness states, "The rain didn't affect the flow of the Lewis River down at my place, but it was filling the dam." Appellees' Exhibit 9, which is the United States Bureau of Geological Survey's own tabulated record of the mean daily elevations of the water surface of the lake, and which is compiled by that office from the weekly recordings of the Gurley Graphic Recorder at the dam, shows that on October 1, 1933, the mean elevation of the lake was 236.75 feet. From that date until December 22 *the lowest mean daily elevation was 233.7 feet,* occurring on November 1. On December 1, 1933, the mean daily elevation was 235.0, and on December 21 was 236.9 (Ex. 9). The peak at or near midnight of that day was 237.6 (Ex. 13). The "filling" of the reservoir in December, as to which the witness Miles undertakes to testify, was thus necessarily limited to the difference between the elevation on December 1 of 235.0 and the peak of 237.6 on the night of the 21st, and of this trifling difference of 2.6 feet, 2.3 feet was stored on December 20 and 21 in an effort by the operators of the dam to reduce the down river flood waters which in the early evening of the 21st had already "pretty generally flooded" the Town of Woodland (Tr. 56).

As to these December rains' having no effect on the river where the witness Miles lived (three miles below the dam), let us look again at the United States Geological Survey's record (Ex. 10) which shows the mean discharges of water at the Ariel Dam for the entire month of December, expressed in second feet. Exhibit 10 shows a mean daily flow of 39,100 second feet on December 6 and shows a rise of over 30,000 second feet from the previous day. It also shows a mean discharge of 52,600 second feet on December 10. It should be noted that these stream flows were both recorded *at the government's own gauging station* a half mile below the dam. And yet the witness Miles testifies that the rains "didn't affect the flow of the river"! It will further be noted that the mean daily discharge of 52,600 second feet occurring on December 10 required almost the entire discharge capacity of two of the large gates, and that the peak flow on that date required slightly more than their entire discharge capacity. (See log entries for December 10, Ex. A-2, and their tabulation in Table I of Appendix to appellant's opening brief).

We turn to the quoted testimony of the witness Miles as to gate positions on December 20 (Appellees' brief, p. 9) wherein he expresses the opinion that gate "No. 1 was up about 10 feet or maybe more, and No. 2 * * * was out about six or eight feet, but the others was tight". (Tr. 115). The capacity of Gate No. 1 is 7,000 second feet, and of Gate No. 2 is 30,000 second feet *when the lake elevation is 237 feet* (Tr. 79), so the maximum possible discharge capacity of these two gates, if

then in the positions testified to by the witness Miles, would necessarily be somewhat less than 15,000 second feet (approximately $10/26\frac{1}{2}\times7{,}000$ for Gate No. 1 plus $8/26\frac{1}{2}\times30{,}000$ for Gate No. 2).

Referring to gate positions on December 21 the witness Miles testifies (Tr. 115-116): "The gates on the 21st were about in same condition as they was the last time I seen them. On the 21st the gates was just the same as the day before. They might have been up a little; not much." (Tr. 116). But the government's estimate of the mean discharge of water at the Ariel Dam on December 20 was 44,600 second feet, and 84,600 second feet on December 21 (Ex. 10), quantities which obviously could not be discharged through the gates if in the positions claimed by Mr. Miles. In this connection, and without repetition here, we invite the Court's attention to the concurrent down stream water conditions, including conditions at Woodland on December 20 and 21, as set forth at pages 69 to 73 of appellant's opening brief and taken directly from the testimony of appellees' witnesses, none of whom was in the employ of or connected with appellant. Where, then, is the *substantial* character of the testimony of Mr. Miles which, if true, would mean that gate positions at which less than 15,000 second feet of water could be discharged resulted in the discharges shown by official government records as well as in the down stream water havoc disclosed by the testimony?

Appellees next quote the testimony of Carl E. Insull (Appellees' brief, pp. 9-10; Tr. 57-66) confirming the

record that the peak of the flood was between 12 and 1 o'clock in the morning of December 22nd, but there is nothing in his testimony showing or creating any implication of negligence on appellant's part.

The testimony of Grady Phillips, quoted at page 10 of appellees' brief, is of the negative type. He did not notice any cutting of the lands *"up to the 20th"* (Tr. 69) but believes the river "was flowing down through the swale on Grieger's place on the 20th, where the wash occurred". (Tr. 74). He saw the river "some time before noon" on December 21 (Tr. 73). On that morning the discharge at the Ariel dam was 73,000 second feet (Tr. 129). His next observation of the river was on the morning of the 22nd. The river "was more like an ocean than it was like a river, then". As the discharge at the Ariel Dam on that day varied from a peak of 129,000 (Tr. 97) at about midnight to 112,600 at 2 P. M. of that day (Tr. 142) such a flow of water was, at its minimum *more than 50% greater than when the witness had last observed it on the 21st,* but that condition does not prove negligence or create any inference of negligence.

At pages 11-13 of their brief counsel quote the testimony of appellee Grieger. His testimony was also quoted at considerable length in our opening brief. As to his testimony it need only be remarked that if the water was flowing through the swale on his land on December 20, as testified to by his neighbor Phillips (Tr. 74), under a maximum daylight spill of but 56,000 second feet (Tr. 129) and was 5 or 6 feet deep across his land on Thursday afternoon, the 21st, as testified to by Mr.

Grieger himself, when the discharge at Ariel was but 78,000 second feet (Tr. 129), his lands could not fail to have been damaged under all the subsequent water conditions shown by the record during the entire evening of December 21, and detailed at length in our opening brief.

It should be noted that the witness Carl E. Insull testified that his place "lays at about the same elevation as the Grieger property". (Tr. 67). It therefore necessarily follows that the Grieger lands, which were a light silt soil washed in by flood waters of prior years (Tr. 187), were subjected to the same damaging flood and current that were so "terrible" at 4 A. M. on December 21 that Mr. Insull could not get out of his house. (Tr. 62-63; 67).

Mr. Grieger in substance admits that the main current of the river was running through his lands on the 21st and that they were being damaged on that date. Note his significant statements (Tr. 158): *"Up until the 21st* the current had been running out in the channel more. * * * Prior to the 20th it was not cutting away any of my land. I did not observe the current cutting away any of my land *up to the 21st."* (Italics ours).

It should also be noted in this connection that appellees' engineer Roberts testified that erosion would start at a flow of approximately 50,000 second feet, and would progressively increase as the volume of water increased (Tr. 194-195). As the Grieger lands were sub-

jected to a flow of that quantity of water, or greater, during much of December 20th and all of December 21st, it was the duty of appellees to furnish for the guidance of the jury *some evidence* as to what part of their damage was caused by the *less than the natural stream flow* to which the Grieger lands were subjected on those dates. These facts, so indisputably shown in the record, make applicable the rule of law emphasized at pages 90 to 91 of appellant's opening brief, namely, that it was appellees' burden to prove what part of their damage was caused by the natural stream flow and what part, if any, by appellant's negligence, if appellant was in fact negligent. Such proof required evidence as to the velocity of the water and proof of the various stages of stream flow at which appellees' lands would be flooded to various depths; but inasmuch as appellees' engineer Roberts frankly admitted he could furnish no information on this subject "without more data" (Tr. 189-190; 184-185), we wonder how the jury arrived at its verdict, unless by sheer guesswork.

At pages 7 to 8 of their brief appellees impliedly challenge the accuracy of the company's log (Ex. A-2), and state that its accuracy "was a question of fact for the jury to determine". There is no testimony disputing its accuracy until counsel question it in their brief. It will be noted that counsel accept as true the time and extent of the final gate positions at 12:16 A. M. on December 22, and the quantity of 129,000 second feet then discharged, but impliedly now challenge the accuracy of the earlier log readings in order to lay the foundation

for their fantastic calculations of the amount of water which they claim was discharged at that time in excess of the concurrent natural stream flow. The log was produced by a witness called by appellees, and its accuracy is accepted by the Federal Government, in that the discharges of water at the dam are "determined from gate operations and from lake elevations", and the discharges of water so ascertained are considered "so thoroughly accurate" that the United States Bureau of Geological Survey "prepared them for publication on a daily basis". (Tr. 96)

At page 8 of their brief appellees criticize appellant's impounding of the flood waters, and its failure to let them "run off as they were wont to do by nature". This contention is effectively answered at page 41 et seq. of appellant's opening brief.

At page 10 of their brief appellees emphasize the statement of Superintendent Shore that he did not start to close any gate until 2 P. M. on the afternoon of December 22, although he testified that he could have closed all or any of them at any time. At page 87 of the Transcript of Record Mr. Shore gave his reasons for his handling of the gates in the manner shown by the record, and no witness testified that any operator's judgment in the circumstances would or should have been differently exercised.

At page 13 of their brief appellees contradict the very record which they themselves introduced (Ex. 9)

by stating that during December "and particularly from the 5th to the 22nd of December, 1933, the company kept backing up the Lewis River behind its dam, increased its storage and raised the elevation of its reservoir to more than 237 feet". We have already discussed this matter to some extent in connection with our comments on the testimony of the witness Miles, but the inaccuracy of counsel's statement and the inaccuracy of the statement in the same paragraph (p. 13) that "the river below the dam was kept at a low stage for several days prior to the tragic and abrupt release of waters at 12:16 A. M., December 22nd, 1933" are conclusively demonstrated by the government's own records (Exhibits 9 and 10), from which the essential data are tabulated for the entire month of December, 1933, as Table II, Page V in the appendix to appellant's opening brief. We do not follow counsel's argument on this point, unless they intend to imply that earlier in the month appellant, by the exercise of some prophetic power, should have then known that an unprecedented flood was coming, and should at that time have prepared for it by releasing waters then stored in the reservoir, thus securing additional storage capacity for the emergency that was to come but thereby at that time augmenting the natural stream flow—the very act which, when done on December 22nd for reasons explained by Superintendent Shore at page 87 of the transcript, counsel now criticize, and which appellees have made the basis of this action for damages.

At page 15 of their brief appellees' counsel criticize appellant's counsel for having shown in appellant's open-

ing brief (pp. 56 to 57; 73) the *average* quantity by which the concurrent natural stream flow was augmented during December 22nd. The reason for appellant's so doing was that that was exactly what was shown by appellees' own engineer, Mr. Roberts (Tr. 177; 185-186). Not a question was asked of Mr. Roberts, or of any other witness, concerning the quantity of water, if any, by which the concurrent natural stream flow was augmented at the moment the remaining opening of Gate No. 5 was completed at 12:16 A. M. on the 22nd, or during the 30-minute period shortly after midnight, or during any other period except for the entire 24 hours of December 22nd. The attempted computations of an alleged excess of water discharged over the concurrent natural stream flow for that 30-minute period first appear in appellees' brief. We will answer them fully later in this brief.

On the same page (15) counsel question appellant's ability to close the gates manually, notwithstanding the introduction of the photograph of the particular mechanism by which that is effected (Ex. A-1) and the positive and uncontradicted testimony of two witnesses that it could be done. (Tr. 48; 86; 124.) That the presence or absence of electric power was not the determining factor in regulating the closing of the gates on December 22nd is evident from the fact that when the first partial gate closing was made at 2 P. M. on December 22nd, the operators, in the further exercise of their judgment, continued to let the discharge slightly exceed the concurrent natural stream flow. (Ex. 13)

At page 10 of their brief appellees' counsel refer to the "evident reluctance" of Mr. Shore to testify, and a similar comment appears at page 16. There is not the slightest excuse for any such comment, as a reading of the testimony of the witnesses Schmidt and Shore, as well as of Griswald, consulting engineer, discloses. Mr. Shore did disclaim ability to *remember* hourly discharges of water and corresponding gate positions during the month of December (Tr. 80-81), but supplied all such information by reference to the power house log. (Tr. 83-86; 125-130; 141-143.) Had any witness attempted to furnish such information from memory he could justly be accused of merely guessing.

At pages 16 to 22 of appellees' brief extensive quotations from the record have been set forth for the purpose of showing the value of appellees' river bottom lands, and the nature and extent of the damage caused to them by the flood waters. There is no present issue as to the value of the lands or of the damage to them caused by the flood waters, but, as pointed out in the authority cited at pages 37-38 of appellant's opening brief, the mere showing of damage to appellees' lands or of the pecuniary amount of such damage creates no implication of negligence. The fundamental issues to be determined from the record are: (1) whether appellant was negligent in its storage of the waters or in their discharge through the gates of the dam in the manner and in the circumstances shown in the record; and (2) the pecuniary damage, if any, caused by appellant's release of water in excess of the concurrent natural stream flow, if

in the circumstances appellant was negligent in releasing any such excess. The second of these two issues becomes immaterial unless there is substantial testimony in the record to prove the first; and if this Court should decide that there is substantial evidence supporting this first issue, there is still no substantial testimony in the record to prove the second issue.

**Discussion of appellees' "Point II" and cases cited.**

**(Appellees' brief, page 24.)**

At pages 24 to 27 of their brief appellees discuss the care required of those who impound the waters of a natural water course. Appellees first cite the case of *O. W. R. & N. Co. v. Williams,* 268 Fed. 56 (C. C. A. 9th; 1920). The two principal points involved in that case were: (1) the time when the statute of limitations began to run; and (2) whether the freshet in question was so unprecedented as to be properly held to be an act of God. The defendant's predecessor had erected barriers in the Coeur d'Alene River which cut off an overflow channel which had carried water in former freshets. The defendant maintained such barriers, thereby leaving an insufficient channel for the carriage of flood waters. The flood in that case was held not to have been so unprecedented as to constitute an act of God, and the Court decided that the defendant's act in so blocking part of the river's channel as to leave insufficient channel capacity to carry the water, thereby causing them to overflow and damage the plaintiff's lands, was negligence. In the instant case the appellees' lands were un-

der several feet of water on December 21 (Tr. 169), long before the peak of the flood and while the lands were getting less than the natural stream flow, and far less natural stream flow than they were later subjected to. The unprecedented character of the flood in the instant case has been sufficiently discussed at pages 59 to 66 of appellant's opening brief.

In *Dahlgren v. Chicago M. & St. P. Ry. Co.,* 85 Wash. 395, 148 Pac. 567 (1915), the defendant was held liable in damages for obstructing a natural gully and for not furnishing a drainage pipe of sufficient size to carry off the accumulated waters which resulted from the embankment. It is significant that in that case the Supreme Court of Washington approved the following instruction as correctly stating the rule (p. 571):

> "The drain provided by the defendant (appellant) to take care of the waters of the stream * * * must have been sufficient to take care of and dispose of the waters flowing down the stream at times of any ordinary freshet, *but need not have been sufficient to provide against any unprecedented flow of high water."* (Italics ours)

We are somewhat surprised to see counsel citing the old English case of *Rylands v. Fletcher,* L. R. 3 H. L. 330 (1868), as it not only does not represent the general rule in this country but has been expressly rejected by the Supreme Court of the State of Washington in *Anderson v. Rucker Bros.,* 107 Wash. 595, 183 Pac. 70 (1919), from which we have quoted at some length on this point at pages 76 to 78 of appellant's opening brief.

Even in England the rigid rule of "liability without fault" imposed by *Rylands v. Fletcher* has been modified in cases where the damage results from the concurrence of an act of God or from concurrence of the act of a stranger.

> See *Nichols v. Marsland,* L. R. 2 Exch. Div. 1 (1876).
>
> *Box v. Jubb,* L. R. 4 Exch. Div. 76 (1879), discussed in 10 Or. Law Rev. 192.

*Crawford v. Cobbs & Mitchell Co.,* 121 Or. 628, 257 Pac. 16 (1927), cited by appellees, has been cited at pages 88 and 97 of appellant's opening brief. This case loses much of its significance from appellees' standpoint when it is recalled that the Supreme Court of Oregon, following the state constitutional requirement, is committed to the "scintilla of evidence" rule—a rule which has been definitely rejected by the Federal Courts (*Pennsylvania Railroad Company v. Chamberlain,* 228 U. S. 333, at 343, 77 L. ed. 825 (1933)—appellant's opening brief, page 98) as well as by the Supreme Court of the State of Washington in *Thomson v. Virginia Mason Hospital,* 152 Wash. 297, at page 301, 277 Pac. 691 (1929). See also, to the same effect, *Davison v. Snohomish County,* 149 Wash. 109, at p. 116, 270 Pac. 422 (1928), and cases cited therein. The inflexibility of the rule in Oregon is well illustrated in the case of *Quil-*

*len v. Schimpf,* (1930) 133 Or. 581, 599; 291 Pac. 1009, 1015, wherein it is said:

> "In their zeal to preserve the trial by jury inviolate, the people of the state of Oregon enacted the following provision of the fundamental law: 'The right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.' Or. Const. art. 7, §3c. That language is clear, plain, concise, and means just what it says."

The case of *Allen v. K. P. Timber Co.,* Oregon Adv. Sheets Vol. 22, p. 653 (Dec. 1935) last cited by appellees, was an action for wrongful death resulting from the bursting of a temporary earth fill. The defense of "act of God" was raised, but the Court held that the flood was one which could have been anticipated and guarded against by the defendant. The Court, following its decision in *Crawford v. Cobbs & Mitchell Co.,* 121 Or. 628, 257 Pac. 16 (1927), held that it was negligence to permit a large volume of water to escape suddenly to another's damage, but the facts of the case were so different from those in the case at bar as to make the decision of little value in passing upon the sufficiency of the evidence to support the verdict in the instant case.

At page 26 of their brief appellees' counsel refer to appellant's "opening everything wide open". We hardly need to call the Court's attention to the misleading character of this language, its utter variance with the facts, and that the "opening everything wide open" must prop-

erly be confined to the completion of the opening of Gate No. 5, already at the time open from 9 to 13 feet. (Tr. 133)

**Discussion of appellees' "Point III"**

**(Appellees' brief, page 27.)**

Under this heading appellees assert that "The question of whether the flood conditions complained of were an act of God was one for the jury", and that even if the flood was an act of God appellant would yet be liable if its negligence concurred with the "unusual flood conditions" to produce injury to appellees' property. As a proposition of law, appellees' statement is inaccurate unless modified to limit appellant's liability to *that part of the damage,* if any, caused by its own negligent act, if appellant was guilty of any negligent act. Under no circumstances could appellant properly be held liable for damage caused to appellees' lands by the natural flood flow of the stream. There is not a word of testimony in the record challenging either the oral testimony of the witnesses or the record evidence of the Bureau of Geological Survey as to the unprecedented character of the flood. (See our opening brief pp. 59 to 66.) The cases cited at pages 90 to 91 of our opening brief make clear the rule that, even though found to be negligent in the character of its operations, appellant could under no circumstances be held liable for damage caused by the natural flood flow.

We find nothing in any of the five cases cited at page 27 of appellees' brief that holds a defendant liable for damage caused by the forces of nature.

Under their "argument" on pages 27 to 29 of their brief appellees' counsel make some astounding statements. We first note this one: " * * * the river did not reach a danger point at any time until the impounded waters of Lake Merwin were abruptly released". Have appellees forgotten, or do they merely ignore, the conditions existing throughout December 21—appellees' lands under five or six feet of water flowing through them on that morning (Tr. 169), Insull's house surrounded by a raging torrent (Tr. 61-62), the Pacific Highway at Woodland impassable, and the town of Woodland "pretty generally flooded" (Tr. 55-56)? (See summary of conditions shown at pages 69 to 73 of appellant's opening brief.) Are appellees repudiating the testimony of their own witnesses?

Again, at page 29, counsel say: " * * * the flood followed the deliberate opening of the gates". The *mean daily flow* for the entire day of December 21 (84,600 second feet; Exhibit 10) was approximately one-third greater during the entire 24 hours of that day than the highest known prior *instantaneous* peak. (Tr. 103.) But appellees' counsel ignore this, and strive to create the impression in their brief that there was no flood until December 22nd.

At page 28 of their brief appellees' counsel make the following statement:

> "The whole doctrine of immunity from the results of Acts of God is predicated upon the proposition that they are so sudden that man cannot forsee them or guard against their consequences."

and cite the case of *Eikland v. Casey,* 290 Fed. 880, as supporting that statement. While many acts of God, such as cyclones or earthquakes, are sudden, we know of no case that would hold appellant liable for the cumulative effects of a flood that steadily increased in magnitude to a point far beyond anything known on the Lewis River within the memory of man.

At page 29 counsel state:

> "The uncontradicted evidence shows that the cutting away of plaintiffs' land did not occur until after midnight of December 22, and that the destruction of plaintiffs' property was concurrent in time with the release of the impounded waters of Lake Merwin."

We respectfully assert that the evidence establishes no such fact. No witness offered any testimony as to what was happening on Mr. Grieger's land during the steadily increasing flood of Thursday, the 21st, or at any time on that day after Mr. Grieger had observed it when flowing at but 78,000 second feet. Mr. Grieger

himself says: "as to how late I was up Thursday night, —in the neighborhood of 10:30. I did not stay up watching this flood at all." (Tr. 171) Nor did any other witness furnish any testimony as to what took place on the Grieger lands while the actual stream flow (at all concurrent times less than the natural stream flow) steadily mounted to 105,000 second feet at 10 P. M. on the night of the 21st. (Tr. 129)

Again, at page 30 of their brief appellees' counsel repeat their misstatement that "shortly after midnight, on December 22nd, 1933, the Defendant Company opened their flood gates, wide open". We need not comment further on this distortion of the record.

On the same page (30) counsel again ignore the testimony by saying that the company's failure to close the gates manually gives rise to an inference that it was unable to do so, and that the company failed to explain why it did not do so. Counsel's inquiry is specifically and fully answered by the witness Shore at page 141 of the Transcript of Record. Appellees are bound by this testimony. (See appellant's opening brief, pp. 100-101.)

At the top of page 31 of their brief appellees' counsel again impugn the accuracy of the company's log (Ex. A-2). As the government itself accepts the log as accurate (Tr. 96) it would seem that the quotation appearing at page 100 of appellant's opening brief furnishes a sufficient answer to counsel's unwarranted aspersions upon the integrity of the log record.

**Discussion of appellees' computations of the quantity of water discharged in excess of stream flow at the peak of the flood.**

At page 40 of their brief appellees charge appellant with having "conveniently omitted" from Table I of the Appendix to its opening brief "the record" from 12:16 A. M. to 2:00 P. M. of Friday, December 22nd, and counsel thereupon proceed to supply certain additional "data". Counsel's comment ignores the purpose of said Table I, as stated in its caption, which was to take from the record and show *all changes in gate positions* and *concurrent lake elevations and discharges* from December 1 to 1:00 A. M. on December 23rd, the time when the record ends. All such data are shown therein. As no change was made in the position of the gates from 12:16 A. M. to 2:00 P. M. on December 22 no part of the record is omitted within the declared purpose of said Table I.

In the first two lines of the tabulation appearing at page 40 of appellees' brief, and which they claim is compiled from Exhibit No. 13, they state that at 12:16 A. M. on Friday, the 22nd, the lake elevation was 237.6 and the spill 129,000 second feet, and that at 12:46 A. M. (30 minutes later) the elevation was 237, the spill not being stated. This "data" neither conforms to the testimony nor to Exhibit 13. Engineer Calkins of the Bureau of Geological Survey, who was certainly as compe-

tent as counsel to read and interpret Exhibit 13, testified:

> "The scale is quite small, but as nearly as one can tell from the record the peak elevation (237.6) was reached at midnight on the 21st, possibly a few minutes before. That is a few minutes before the beginning on the 22nd."

We do not understand why counsel set forth in their tabulation, as "data" taken from Exhibit 13, the statement that the elevation of the lake was still 237.6 at 12:16 A. M. and that the elevation dropped six-tenths of a foot during the ensuing 30 minutes and reached elevation 237 at 12:46 A. M. on the 22nd. An examination of Exhibit 13 does not support those statements. On the contrary, Exhibit 13 shows clearly that the gauge dropped five-tenths of a foot within the 16-minute period following midnight. That 16-minute period was coincident with the completion of the final 17½ foot opening of No. 5 gate.

At page 5 of their brief appellees attempt to demonstrate that during the 30-minute period "immediately succeeding midnight" on December 22 the average discharge from the spillway was 48,400 second feet in excess of the concurrent natural stream flow. The only possible basis on which to support such a finding would be the assumption that during that 30-minute period the surface of the entire lake of 4000 acres actually dropped 6 inches. As we shall demonstrate, it is inconceivable that such an assumption could be in any degree accurate.

Appellant's brief (page 53) shows it to be impossible to discharge 87,120,000 cubic feet of water (the quantity which would represent a lowering of the elevation of the lake surface by 6 inches) during the 16-minute period between midnight and 12:16 A. M. on December 22, through an opening in Gate No. 5 capable of discharging only 11,520,000 cubic feet of water during that period of time. The only way 87,120,000 cubic feet of water in excess of stream flow could have been discharged during that 16-minute period through the then existing spillway openings, namely, all five gates fully opened, would have been for the natural stream flow to have suddenly decreased its volume by 75,600,000 cubic feet (that quantity representing the difference between 87,120,000 cubic feet which appellees' brief states was suddenly discharged in excess of stream flow) and the 11,520,000 second feet capable of being discharged through the additional spillway capacity created by the final 17½-foot opening of No. 5 gate. 75,600,000 cubic feet divided by 960 seconds (or 16 minutes) equals 78,750 cubic feet. That great reduction in natural stream flow would have lasted only 16 minutes, or 960 seconds, as the record made by the pencil on the chart indicates that the decrease in lake level was very slight during the following 14 minutes of that 30-minute period (from 12:16 A. M. to 12:30 A. M.). Consequently, if counsel's assumptions are sound, the natural stream flow

must have again suddenly increased to over 100,000 second feet. Thus we would have a condition of a sudden cessation of natural stream flow of approximately 75%, or to 25% of its then full volume, for 16 minutes, followed by an immediate rise and return to approximately its former full volume. This is so utterly improbable and unbelievable that the correctness of the data on which it is based, namely, the record made by the pencil on the chart for this short period, must be questioned.

A common method of demonstrating the absurdity of any conclusion is to assume as true a premise known to be false, and then show the absurdity of such assumption by obtaining results which in themselves are either impossible or inconceivable. By assuming, as appellees' counsel do, that the almost vertical mark made by the pencil on the elevation chart (Ex. 13) during the 16 minutes of final opening of gate No. 5 proves a correspondingly rapid lowering of the entire surface of the lake during that 16-minute period, the unreasonableness of such an assumption can be shown graphically and also proven by computation. We will undertake to do so.

For purposes of assumption, not admitting its correctness as representing the actual lake elevations after midnight on the 22nd, and to test the accuracy of the mathematical calculations made by appellees' counsel, the following record is compiled from Exhibit 13:

TABLE A.

| Day | Hour | Chart Record Exhibit 13 Elevation | Approx. Amount of Spill, Sec. ft. | |
|---|---|---|---|---|
| Dec. 21 | 10:00 p.m. | 237.4 | 105,000 | (Ex. A-2) |
| " | 11:00 p.m. | 237.5 | 100,000 | (Ex. A-2) |
| " | 12:00 midnight | 237.6 | 105,000 | Gate position same as at 10:00 p.m.—Tr. 133. |
| Dec. 22 | 12:16 a.m. | 237.1 | 129,000 | (Tr. 97) |
| " | 12:30 a.m. | 237.0 | 128,255 | Proportionate decrease in spill with gates in same position and decreasing lake level. |
| " | 2:00 a.m. | 236.8 | 126,765 | |
| " | 4:00 a.m. | 236.5 | 124,530 | |
| " | 6:00 a.m. | 236.1 | 121,550 | |
| " | 8:00 a.m. | 235.8 | 119,315 | |
| " | 10:00 a.m. | 235.5 | 117,080 | |
| " | 12:00 noon | 235.2 | 114,845 | |
| " | 2:00 p.m. | 234.9 | 112,600 | (Tr. 142) |

COMPUTATION FOR ACTUAL STREAM FLOW BASED ON ABOVE ASSUMPTION

Period 10:00 p.m. Dec. 21 to 11:00 p.m. Dec. 21:

Average discharge through gates 102,500 sec. ft.

Actual increase in lake elevation 0.1 ft.

0.1 ft. = 400 acre feet in 1 hour = 9600 acre ft. per day = 4800 sec. ft. average increase over spill.

Average stream flow for period = 102,500 + 4800 = 107,300 sec. ft.

Period 11:00 p.m. Dec. 21 to 12:00 midnight Dec. 21:

Average discharge through gates 102,500 sec. ft.

Actual increase in lake elevation 0.1 ft.

0.1 ft. increase = 400 acre ft. in 1 hour = 9600 acre ft. per day = 4800 sec. ft. average increase over spill.

Average stream flow for period = 102,500 + 4800 = 107,300 sec. ft.

Period 12:00 midnight Dec. 21 to 12:16 a. m. Dec. 22:

Average discharge through gates 117,000 sec. ft.

Assumed decrease in lake elevation 0.5 ft.

0.5 ft. decrease=2000 acre ft. in 16 minutes=180,000 acre ft. per day = 90,000 sec. ft. average decrease from spill.

Average stream flow for period = 117,000 — 90,000 = 27,000 sec. ft.

Period 12:16 a.m. Dec. 22 to 12:30 a.m. Dec. 22:

Average discharge through gates 128,627 sec. ft.

Assumed decrease in lake elevation 0.1 ft.

0.1 ft. decrease = 400 acre ft. in 14 minutes = 41,140 acre ft. per day = 20,570 sec. ft. average decrease from spill.

Average stream flow for period = 128,627 — 20,570 = 108,057 sec. ft.

Period 12:30 a.m. Dec. 22 to 2:00 a.m. Dec. 22:

Average discharge through gates 127,510 sec. ft.

Assumed decrease in lake elevation 0.2 ft.

0.2 ft. decrease = 800 acre ft. for 1½ hours = 12,800 acre ft. per day = 6,400 sec. ft. average decrease from spill.

Average stream flow for period = 127,510—6,400= 121,110 sec. ft.

Repeating this computation similarly for each period, and tabulating the results, we get Table B and Chart A, following.

## Table B.

| Day | Hour | Recorded Elevation Shown by Exhibit 13 Ft. above Sea level | Fluctuation in Recorded Elevations Between Time shown Ft. | Spill Through Gates Sec. Ft. | Average Spill Between Time shown Sec. Ft. | Average Added to Lake Between Time shown Sec. Ft. | Average Drawn From lake Between Time shown Sec. Ft. | Average Natural Stream flow Between Time shown Sec. Ft. |
|---|---|---|---|---|---|---|---|---|
| Dec. 21 | 10:00 p.m. | 237.4 | | 105,000 | | | | |
| | | | + .1 | | 102,500 | 4,800 | 0 | 107,300 |
| Dec. 21 | 11:00 p.m. | 237.5 | | 100,000 | | | | |
| | | | + .1 | | 102,500 | 4,800 | 0 | 107,300 |
| Dec. 21 | 12:00 mid. | 237.6 | | 105,000 | | | | |
| | | | — .5 | | 117,000 | 0 | 90,000 | 27,000 |
| Dec. 22 | 12:16 a.m. | 237.1 | | 129,000 | | | | |
| | | | — .1 | | 128,627 | 0 | 20,570 | 108,057 |
| Dec. 22 | 12:30 a.m. | 237.0 | | 128,255 | | | | |
| | | | — .2 | | 127,510 | 0 | 6,400 | 121,110 |
| Dec. 22 | 2:00 a.m. | 236.8 | | 126,765 | | | | |
| | | | — .3 | | 125,647 | 0 | 7,200 | 118,447 |
| Dec. 22 | 4:00 a.m. | 236.5 | | 124,530 | | | | |
| | | | — .4 | | 123,040 | 0 | 8,600 | 114,440 |
| Dec. 22 | 6:00 a.m. | 236.1 | | 121,550 | | | | |
| | | | — .3 | | 120,432 | 0 | 7,200 | 113,232 |
| Dec. 22 | 8:00 a.m. | 235.8 | | 119,315 | | | | |
| | | | — .3 | | 118,197 | 0 | 7,200 | 110,997 |
| Dec. 22 | 10:00 a.m. | 235.5 | | 117,080 | | | | |
| | | | — .3 | | 115,962 | 0 | 7,200 | 108,762 |
| Dec. 22 | 12:00 noon | 235.2 | | 114,845 | | | | |
| | | | — .3 | | 113,722 | 0 | 7,200 | 106,522 |
| Dec. 22 | 2:00 p.m. | 234.9 | | 112,600 | | | | |

# CHART "A"

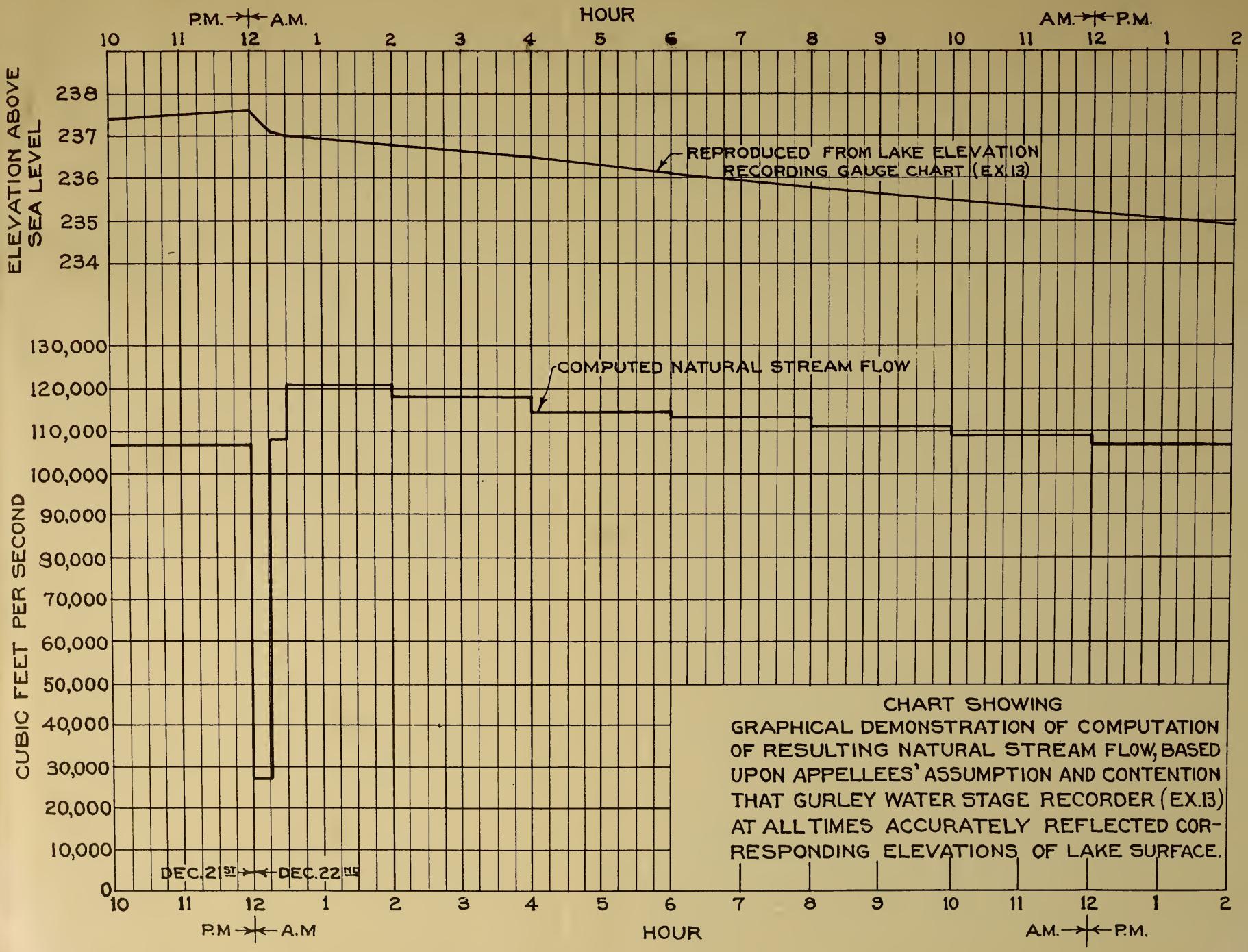


CHART SHOWING
GRAPHICAL DEMONSTRATION OF COMPUTATION OF RESULTING NATURAL STREAM FLOW, BASED UPON APPELLEES' ASSUMPTION AND CONTENTION THAT GURLEY WATER STAGE RECORDER (EX.13) AT ALL TIMES ACCURATELY REFLECTED CORRESPONDING ELEVATIONS OF LAKE SURFACE.

Referring to the last column of Table B it will be noted that if the record made by the pencil on the elevation chart indicated a true lake elevation after midnight, as has been assumed, the average stream flow between 11:00 p. m. and midnight was 107,300 second feet; for the next 16 minutes the average stream flow would have dropped to 27,000 second feet, or approximately 25% of full volume; and during the following 14 minutes between 12:16 A. M. and 12:30 A. M. it would have again risen to 108,057 second feet, or nearly full volume. Such conclusion is so at variance with sound reasoning that the premise upon which the conclusion was based was obviously erroneous.

In appellees' brief, page 39, appellant's contention that the opening of No. 5 gate to its full open position had some disturbing effect on the mechanism of the recording gauge is questioned by the query as to why the closing of the gate should not have had a corresponding effect on the gauging mechanism. The effect on the gauging mechanism caused by the swirling action of the water which exerted a suction effect on the water level in the stilling well, which in turn was caused by the full opening of No. 5 gate, continued from 12:16 A. M., when No. 5 gate was finally fully opened, to 2:00 P. M. December 22 when No. 5 gate was again partially closed. The discrepancy between the recorded elevation on the chart and the true elevation of the water surface of the lake was greatest at 12:16 A. M. when the lake elevation was at its maximum height, with a gradual diminishing discrepancy as the lake elevation dropped, and with a

final elimination of the error when the combination of reduced lake level and closing of No. 5 gate was sufficient to stop the swirling action which had exerted a suction on the stilling well. The exact performance of the gauging mechanism when No. 5 gate was closed cannot be determined from the record, as that gate was still open 8½ feet at 1:00 A. M. on December 23rd, which is the last gate reading shown in the record. (Tr. 143.)

We have shown the fallacy of accepting the record on Exhibit 13 for the time while No. 5 gate was fully opened as a correct indication of the actual water level in the lake. We have also offered a reasonable explanation for the cause of the failure to obtain automatically a true contemporaneous record of lake elevation from Exhibit 13. There is no dispute that the actual lake level dropped 4 feet in the 24-hour period from 12:00 o'clock midnight of December 22 to 12:00 o'clock midnight of December 23, causing a corresponding discharge from the lake during this period of time of approximately 16,000 acre feet, or an average of 8000 second feet in excess of the concurrent natural stream flow; but appellees' claim that the discharge from the lake at any time during this period was at the rate of 48,400 cubic feet per second, or at any rate of discharge approaching this figure, is based upon an absurd and unreasonable premise.

In this same connection, at page 39 of appellees' brief their counsel quote, with emphasis, the testimony

of superintendent Shore (Tr. 87) wherein he states that the drop in elevation can be determined exactly from "these government records" (Ex. 13). Obviously the drop *at the gauge itself* is so shown, but, as we have amply demonstrated, it is as illogical to contend that the elevation of the entire lake concurrently and correspondingly dropped from 12:00 to 12:16 A. M. on the 22nd as it would be to assert that a train starts from a station at the rate of fifty miles an hour, merely because the drive wheels of the locomotive momentarily slip and revolve at a rate that would normally produce that speed.

At page 41 of appellees' brief their counsel again reveal their reliance upon the testimony of the witness Miles, and refer to it as a "conflict of evidence" between his testimony and the company's log record (Ex. A-2) which "resolved itself into a question of fact for the determination of the jury". As we have already shown, the concurrent downstream water conditions so forcefully belie Mr. Miles's testimony as to the gate positions as to make it obviously contrary to physical facts. As said by the Supreme Court of Washington in *Leach v. Ericksen* (1931), 161 Wash. 473, 476, 297 Pac. 738, 739:

> "The verdict of a jury if contrary to natural laws or physical facts cannot be sustained. In Fluhart v. Seattle Elec. Co., 65 Wash. 291, 118 P. 51, 53, we said: 'Oral statements, although undisputed, must yield to undisputed physical facts and conditions with which they are irreconcilable.'
>
> "See, also Mandel v. Washington Water Power Co., 83 Wash. 19, 144 P. 921."

To the same effect is *United States v. Kerr,* 61 F. (2d) 800, 803, (C. C. A. 9th, 1932), cited at pages 53-54 of appellant's opening brief.

We reiterate our belief that an examination of the record will convince the Court that it contains no substantial evidence in support of the verdict and judgment.

Respectfully submitted,

ELLIS & EVANS,
OVERTON G. ELLIS,
ROBERT E. EVANS,

LAING & GRAY,
JOHN A. LAING,
HENRY S. GRAY,
Attorneys for Appellant.

No. 8178

# United States

# Circuit Court of Appeals

## For the Ninth Circuit.

18

UNITED STATES OF AMERICA,

Appellant,

vs.

ARTHUR J. EIDE, by BERTHA K. EIDE, his Guardian ad Litem,

Appellee.

# Transcript of Record

**Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division**



Parker Printing Co., 545 Sansome Street, San Francisco 60—6-12-36

No. 8178

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# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Index

In the Southern Division of the United States District Court for the Northern District of California.

No. 991-L.

ARTHUR J. EIDE, by BERTHA K. EIDE, His Guardian ad Litem,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

APPEARANCES

Attorneys for Appellant:

H. H. McPIKE, Esq.,
United States Attorney.

THOS. C. LYNCH, Esq.,
Asst. U. S. Attorney.

Attorney for Appellee:

ALVIN GERLACK, Esq.,
Mills Bldg.,
San Francisco, Calif.

---

[Title of Court and Cause.]

COMPLAINT—WAR RISK INSURANCE.

Plaintiff complains of the defendant and alleges:

I.

That plaintiff is a citizen of the United States and a resident of the Northern District and State of California, and of the County of Siskiyou therein.

II.

That this action is brought under the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924 and amendatory acts, and is based upon a policy or certificate of insurance issued under said acts to the plaintiff by the defendant.

III.

That on or about the 23rd day of July, 1917, plaintiff entered the armed forces of the defendant; that he served the defendant as a Sergeant first class in its Army from the said July 23, 1917, to on or about January 29, 1919, when he was honorably discharged from said service and that during all of said time he was employed in active service of defendant.

IV.

That immediately after entering the defendant's said service plaintiff made application for and was granted insurance in the sum of $10,000.00 by the defendant, who thereafter issued to plaintiff its certificate No. T 1,841,792 of his compliance with said acts, so as to entitle him and his beneficiaries to the benefits of said acts, and the rules and regulations of said bureaus and the directors thereof, and that during the term of his said service the defendant deducted from his pay for such [1*] service, the monthly premiums provided for by said acts and the rules and regulations promulgated by the defendant. That plaintiff paid all premiums promptly

*Page numbering appearing at the foot of page of original certified Transcript of Record.

when the same became due on said policy until Jan. 29, 1919.

V.

That while serving the defendant as aforesaid, the plaintiff contracted certain diseases, injuries and disabilities resulting in and known as neuro-psychiatric disease, and other disabilities as shown by the records and files of the Veterans' Administration.

VI.

That said diseases, injuries and disabilities have continuously since January 29, 1919, rendered and still do render the plaintiff wholly unable to follow any substantially gainful occupation, and such diseases, injuries and disabilities are of such a nature and founded upon such conditions that it is reasonably certain they will continue throughout plaintiff's lifetime in approximately the same degree. That plaintiff has been, ever since January 29, 1919, and still now is, permanently and totally disabled by reason of, and as a direct and proximate result of such disabilities above set forth.

VII.

That plaintiff on April 22nd, 1929, made application to the defendant, through its Veterans Bureau and the Director thereof, for the payment of said insurance for permanent and total disability, and that said Veterans Bureau, and the Director thereof have refused to pay plaintiff said insurance and on June 29, 1932 disputed plaintiff's claim to said

insurance and disagreed with him concerning his rights to the same. [2]

That under the provisions of the said act and other acts amendatory thereof, plaintiff is entitled to the payment of fifty-seven and 50/100 Dollars ($57.50) for each and every month transpiring since January 29, 1919, and continuously thereafter so long as he lives and continues to be permanently and totally disabled.

IX.

That plaintiff has employed the services of Alvin Gerlack, an attorney and counsellor at law, duly licensed and admitted to practice before this court and all courts of the State of California. That a reasonable attorney's fee to be allowed to plaintiff's attorney for his services in this action is ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended.

WHEREFORE plaintiff prays judgment as follows:

First: That plaintiff since January 29, 1919, has been and still is, permanently and totally disabled.

Second: That plaintiff have judgment against the defendant for all of the monthly installments of $57.50 per month for each and every month from the said January 29, 1919, and continuously so long

as he lives and remains permanently and totally disabled.

Third: Determining and allowing to plaintiff's attorney a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance sued upon and involved in this [3] action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended, and such other and further relief as may be just and equitable in the premises.

ALVIN GERLACK

Attorney for Plaintiff. [4]

United States of America,
District and State of California,
County of .....—ss.

Bertha K. Eide, being first duly sworn, deposes and says:

That *he* is the plaintiff in the above entitled action.

That *he* has heard read the foregoing complaint and knows the contents thereof.

That the same is true of *his* own knowledge and belief except as to those matters stated upon information and belief and that as to those matters *he* believes them to be true.

BERTHA K. EIDE

Subscribed and sworn to before me this 14th day of July, 1932.

[Seal] HENRIETTA HENFREN

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 19, 1932. Walter B. Maling, Clerk. [5]

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[Title of Court and Cause.]

ANSWER TO COMPLAINT.

The United States of America for answer to the complaint of plaintiff herein denies each and all of the allegations thereof.

WHEREFORE, defendant prays that plaintiff take nothing by his said action and that defendant have its costs herein incurred.

April 28, 1933.

I. M. PECKHAM

United States Attorney.

Service of the within answer by copy admitted this 28 day of April, 1933.

ALVIN GERLACK

Attorney for Pltf.

[Endorsed]: Filed Apr. 29, 1933. Walter B. Maling, Clerk. [6]

[Title of Court and Cause.]

JUDGMENT.

This cause came on regularly to be tried on the 20th day of February, 1934, and was thereafter regularly continued to the 23rd day of February, and thereafter regularly continued to the 26th day of February and thereafter regularly continued to the 27th day of February, 1934, Alvin Gerlack, Esq., appearing as counsel for the plaintiff, and Hon. H. H. McPike, United States Attorney, and Gustav Hjelm, Esq., and Thomas C. Lynch, Esq., Assistant United States Attorneys for the Northern District of California, appearing as counsel for the defendant.

A jury of twelve persons was regularly impaneled and sworn to try said cause. Witnesses on the part of plaintiff and defendant were sworn and examined, and documentary evidence on behalf of the parties hereto, was introduced.

After hearing the evidence, arguments of counsel, and the instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into court their verdict in words and figures as follows, to-wit:

[Title of Court and Cause.]

"VERDICT OF THE JURY.

We the jury in the above entitled cause, find for the plaintiff Arthur J. Eide, and fix the date of his permanent and total disability from

following continuously, any substantially gainful occupation, beginning January 29, 1919.

Dated: Feb. 27, 1934.

(Signed) S. E. CLARK
Foreman." [7]

And the Court having fixed the plaintiff's attorney's fees in the amount of ten per centum (10%) of the amount of insurance recovered in this action:

It is Ordered, Adjudged and Decreed that Arthur J. Eide the plaintiff, do have and recover from the United States of America, the defendant, the sum of Eight Thousand Nine Hundred Seventy and 00/100 Dollars ($8,970.00), being one hundred and fifty six (156) accrued monthly installments of insurance at the rate of $57.50 per month beginning January 29, 1919 up to the filing of the above entitled cause on January 19, 1932, less plaintiff's attorney's fees as herein provided.

It is Further Ordered, Adjudged and Decreed that the defendant the United States of America, deduct ten per centum (10%) of the amount of insurance recovered in this action, and pay the same to Alvin Gerlack of San Francisco, California, plaintiff's attorney for his services rendered before this court, payable at the rate of ten per centum (10%) of all back payments and ten per centum (10%) of all future payments which may hereafter become due on account of such insurance, said amounts to be paid by the Veterans Administration, or its successor, if any, to said Alvin Gerlack or his

heirs out of any payments to be made to said Arthur J. Eide or his beneficiary or estate in the event of his death before two hundred and forty (240) of said monthly installments have been paid.

Judgment entered: February 27, 1934.

WALTER B. MALING, Clerk,
By F. M. Lampert,
Deputy Clerk.

Approved as to form:
THOS. C. LYNCH
Assistant United States Attorney.

Receipt of a copy of the within judgment is hereby admitted this 1 day of March, 1934.

H. H. McPIKE
By THOS. C. LYNCH
Attorney for Deft. [8]

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[Title of Court and Cause.]

## PETITION FOR APPEAL. ASSIGNMENT OF ERRORS.

The United States of America, defendant in the above-entitled action, by and through H. H. McPike, United States Attorney for the Northern District of California, feeling itself aggrieved by the judgment entered on the 27th day of February, 1934, in the above-entitled proceedings, does hereby appeal from the said judgment to the Circuit Court of Appeals for the Ninth Circuit.

And in connection with its petition for appeal therein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it and upon which it relies to reverse the judgment herein:

I.

The District Court erred in denying defendant's motion for a non-suit on the ground that no evidence had been brought forth to show the disability on the date alleged in the complaint.

II.

The District Court erred in denying defendant's motion for a directed verdict on the ground that the evidence was insufficient to sustain the allegation of the complaint to [9] the effect that the plaintiff became totally and permanently disabled prior to the date of lapse of his insurance policy.

WHEREFORE, defendant prays that its appeal be allowed, that a transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, that this assignment of errors be made a part of the record in its cause, and that upon hearing of its appeal, the errors complained of be corrected and the said judgment of February 27, 1934, may be reversed, annulled and held for naught; and further that it may be adjudged and decreed that the said defendant and appellant have the relief prayed

for in its answer and such other relief as may be proper in the premises.

H. H. McPIKE
United States Attorney
Attorney for Defendant and Appellant.

[Endorsed]: Filed May 28, 1934. Walter B. Maling, Clerk.

Service of the within petition for appeal Assignment of Errors by copy admitted this 25 day of May, 1934.

ALVIN GERLACK,
Attorney for Plaintiff. [10]

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[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND THAT NO SUPERSEDEAS AND/OR COST BOND BE REQUIRED.

Upon reading the petition for appeal of the defendant and appellant herein, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that no bond on this appeal, or supersedeas bond, or bond for costs

or damages shall be required to be given or filed.

Dated: May 25, 1934.

HAROLD LOUDERBACK
United States District Judge.

[Endorsed]: Filed May 28, 1934. Walter B. Maling, Clerk. [11]

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[Title of Court and Cause.]

STIPULATION AND ORDER EXTENDING TERM WITHIN WHICH TO FILE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action that the defendant may have to and including the 15th day of March, 1936, within which to prepare, file and serve its engrossed bill of exceptions, and

IT IS FURTHER STIPULATED AND AGREED that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of this Court, be extended to and into and so as to include the 4th day of April, 1936, thereof.

AL GERLACK,
Attorney for Plaintiff.
UNITED STATES ATTORNEY
Attorney for Defendant.

It is so ordered:

HAROLD LOUDERBACK,
United States District Judge.

Dated: February 27, 1936.

[Endorsed]: Filed Mar. 3, 1936. Walter B. Maling, Clerk. [12]

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[Title of Court and Cause.]

DEFENDANT'S ENGROSSED BILL OF EXCEPTIONS.

To the Plaintiff above-named and to
Alvin Gerlack, Esq., her Attorney:

You, and each of you, will please take notice that the attached constitutes defendant's engrossed bill of exceptions.

H. H. McPIKE,
United States Attorney
Attorney for Defendant.

[Endorsed]: Filed Mar. 14, 1936. Walter B. Maling, Clerk. [13]

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[Title of Court and Cause.]

ENGROSSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 23rd day of February, 1934, the above-entitled cause came on for trial; Mr. Alvin Gerlack appearing for the plaintiff and Messrs. H. H. McPike, United States Attorney

for the Northern District of California, Gustav B. Hjelm and Thomas C. Lynch, Assistant United States Attorneys for said district, appearing for defendant; a jury was impaneled and sworn and thereupon the following proceedings took place;

TESTIMONY OF JOSEPH F. HENRETTI,

a witness produced on behalf of the plaintiff, after first being duly sworn, testified as follows:

I have worked for Marsh-McLennan Company since 1929. Previous to that I was with J. B. F. Davis. Arthur J. Eide and I were pals together before the war. We worked together for about four years. Before the war in the years Arthur and I was working for Davis together he was always very studious and energetic in his work there and put in a lot of time and was very ambitious. He did insurance work, underwriting. He was very neat, always neat in his appearance. I worked in the same department with him. He got along very good with his work. [14] After the war I saw him either July or August of 1919, I am not sure of the time because it was the fifth of July I think when I was discharged. I met him downtown and I asked him what he was doing. He said he was doing some clerical work for the S. P. and I asked him why he didn't come back to Davis' and he said "I don't want to work over there any more". He said "What are you working up there for?" I said, "That is a good chance." He said, "Oh, I don't care to work." He seemed different and I was out with him a few

(Testimony of Joseph F. Henretti.)

times after that and gradually I got away from him because I didn't know what the trouble was, whether he was sore at me for no reason at all, but he just seemed different. Before the war we were always on good terms. In fact I wrote to him when he was in North Carolina. He was very sociable before and he had a way of thinking everybody was against him and he didn't seem the same. Afterwards he seemed—he didn't care much about working and he would only take—he would work in one place a short time and the next time I would see him he would be working some place else. I think he worked for a supply house a while and lasted there for two weeks or a month. I asked him what the trouble was when I met him and he said oh, they gave him a dirty deal and that was all there was to it. But he seemed so changed that I gradually drifted away from him until we went in the garage business and at the time I went out to get some gas one night—this was quite a while afterward—he filled the gas tank up and left the top off and wouldn't take any money. I said, "Go on, take the money", and I laid the money down there and he left it there and I had to put the top on the gas tank and I didn't know whether he had it in for me or not, what caused it. In 1919 he didn't seem the same as he did before. Now this garage incident was around 1923. I would say at that time that he acted irrational. In 1919 he looked [15] physically all right but he seemed to have a different attitude.

(Testimony of Joseph F. Henretti.)

He was indifferent to me and would ignore me at times. He didn't keep himself as neat as he did previous to the war [16] and he didn't seem to care much about his personal appearance. From 1919 up until 1923 I have seen him off and on for maybe ten or twelve times but I could not say whether he appeared rational or irrational. He complained of headaches many times before the garage incident. In 1919 I noticed that he was nervous. When I was out to the garage he had a kind of stare. I didn't notice it in 1919. He was not nervous like that before the war.

A. Yes. Well, he was ambitious before the war and, of course, after the war he drifted from one job to another.

The COURT: That is your conclusion to say that he wasn't ambitious because he drifted.

He wasn't happy after the war. He was altogether different. He was always happy before.

Cross Examination.

Before the war we used to box together once in a while. He used to be a ball player. I think he played ball a little bit when he came back from the service here in San Francisco and I think he played up around Dunsmuir. During the period between 1919, when I first came back from the war, and 1923, when I saw him in the garage, I saw him perhaps ten or twelve times, maybe more.

## TESTIMONY OF WILLIAM ROMAINE.

William Romaine, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

I am associated with Marsh-McLennan, J. B. F. Davis & Company, and have been with them for over forty years. I was office manager with J. B. F. Davis & Son Company from 1907 to 1929. I know Arthur J. Eide in a business way. He came to work for us in November, 1912, and he left on December 12, 1917, to go to war. Between 1912 and 1917 I saw Mr. Eide every working day practically all the time he was there. I [17] had charge of the whole office. I knew him very well, came in contact with him, keeping records of attendance and absence and earnings and so forth. During this period I think he had a very happy appearance, was a very efficient clerk, did his work well, and to all appearances was a perfectly normal individual. He was continuously employed from 1912 to 1917. As to my recollection, Mr. Eide came back to the office immediately after the war. I think it was 1919 but I couldn't give you the month or date. He appeared changed at that time. He simply came into the office and talked to the different boys and he was [18] very friendly with different ones, most of the firm and myself around the office, and he was offered his old position if he wished to accept it. I offered that to him personally. His reaction was that he was indifferent and a different man entirely. He didn't seem the

(Testimony of William Romaine.)

same happy sort of an individual and he was indifferent about accepting reemployment. In fact he was changed so much that I asked Mr. Henretti, who was one of Mr. Eide's associates if he knew what was the matter. I saw him one time after that when he was in the garage business and he was just about the same.

Cross Examination.

Before the war Mr. Eide was in the Fire Department. He was doing clerical work, examining policies. He was getting $85 a month when he left us.

---

TESTIMONY OF ARTHUR F. HAMMER.

Arthur F. Hammer, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

I am a restaurant proprietor at 115 Sixth Street, San Francisco, California. I have known Arthur J. Eide for the last twenty-five years or so. I used to play ball with him before he went in the army. He appeared physically fine and I never observed anything wrong with him mentally before he went to war. After he came back I was in partnership with him in the garage business on Divisadero Street San Francisco. This was about 1921, 1922 or 1923, I think. I think it was November of 1922. We were in partnership I would say about six months. I came to the conclusion Mr. Eide must be crazy, at

(Testimony of Arthur F. Hammer.)

the time I had the garage. After I found we were losing business and there must be something wrong so I had to get out of the business and go back to the restaurant business. When I had the garage in 1923 I had several occasions to watch him while he was waiting on customers [19] and I noticed unusual things about his conduct. At times he would be standing at the gasoline pump staring into space for maybe half an hour at a time. I would be working on cars at the back of the garage and I would come up and ask him what was the trouble. He would be just looking into space and wouldn't listen to what I said. It seemed to me as though he wouldn't listen to anything. He would complain about his head aching him. I don't know how much money Mr. Eide drew out of the business and I don't know whether he was subsequently employed. After the garage venture I also saw him in 1919. He came in to eat in the place of business and I would just talk casually to him. I noticed he wasn't exactly the same man he was before the war. I think it was in 1919 that I saw him. I saw him frequently after we dissolved the partnership in the garage. He would come into my restaurant at Sixth and Mission Streets, San Francisco. I know one time he came down there with a Morris Contract to have me sign. He wanted to borrow money to build an invention that he had in view and I passed it off. About every half hour he would come in with that

(Testimony of Arthur F. Hammer.)

same contract and want me to sign it. He came in about five or six times. Of course I didn't sign it. He wouldn't look you in the face. He would look down and sort of hold the contract in front of me and seemed to be in a hurry to go places. I also noticed that he always seemed to think people were talking against him. He always thought there was somebody was not pulling for him. I noticed this attitude a little before I went into the garage business but didn't pay much attention to it. It was after I went in the business with him that time that I found it. When I first saw him in September of 1919 he seemed kind of distant, didn't seem to have the same manner about him. He seemed to have a far away look, seemed to be looking into blank space. This was different from the way he appeared before the war. After the garage business he [20] would come into the restaurant to eat. He would sit up at the counter to have meals and when the girl put it down in front of him he would stand there and look at it, look into space. I would have to go up and ask him what was the matter. He wouldn't evidently hear me. I would have to shake him and then he would kind of wake up and start to eat. His meal would be sitting in front of him sometimes maybe five, ten or fifteen minutes before he would start it after I had gone up and talked to him. Then he would kind of watch. He would eat and then lay down his knife and fork and kind of look into space some more, maybe sometimes three-quarters of an hour, before he would go out and sometimes he

(Testimony of Arthur F. Hammer.)

would get up and walk out and come back in again. Before I was in the garage business he used to come in the restaurant and he would seem kind of strange but I didn't pay any attention to it. Before the war he was always pleasant, always jolly, laughing, able to carry on a conversation. After he wasn't very cordial, seemed to be distant.

Cross Examination.

Prior to the time I went into partnership with him I had not paid any attention to anything queer or strange about him. That is, I came in contact with so many people and people act queer at certain times and I felt as though probably the war made some kind of a change over him. That is the reason why I didn't pay much attention to that. He acted a little strange but I didn't consider it of any moment at that time. The affidavit which you have shown me refreshes my recollection as to the time I went into the garage business with Mr. Eide. It was in August, 1923. I wouldn't say that prior to August 1923 I did not take notice of anything strange or queer or irrational in the plaintiff and his actions. It was about two months after I entered into the partnership with him that I first noticed that Mr. [21] Eide was losing interest in the business and his work, and it was about this time that I first noticed he would stand looking at customers and refuse to provide them with gasoline or oil.

## DEPOSITION OF FRANK A. BARRETT.

The deposition of Frank A. Barrett, a witness for the plaintiff, was read in evidence and the same reads as follows:

My name is Frank A. Barrett. I am thirty-seven years old, residing at Lusk, Wyoming. I am an attorney. I first met Arthur Eide in the service at the Balloon School, Fort Omaha, Nebraska, in the summer of 1918. I should say about July 1st. He was a sergeant, first class, Sixtieth Balloon Company of the Air Service. We were members of the same company and I was with him until the middle of January, 1919. While I was acquainted with Mr. Eide he got sick with the influenza during the epidemic. As near as I can recollect it was in September or October of 1918. At that time we were stationed at Florence Field, Fort Omaha. We were quartered in tents which were heated by the usual Sibley stoves and the weather was chilly fall weather. Mr. Eide was removed from our company and sent to the hospital. I should say he was away about one month. Mr. Eide and I have slept in the same tent together for several months prior to his sickness and we worked together all of the time. Before he became sick his health was A number one and after he returned he was in bad health and did not have the pep that he had prior to his sickness and he seemed worried and sickly. After he returned he complained continually of severe headaches and pain in the back of his head. It was difficult to get him out of bed as he would rather

(Deposition of Frank A. Barrett.)

stay in the barracks and rest and sleep and complained of headaches; acted rather [22] sluggish and drowsy. I noticed that he would lay in bed at every opportunity; whereas before he was always on the go; rather extremely lively sort of fellow. Also he did not perform his work as he had before and it was necessary to perform some of his duties for him. After Mr. Eide returned from the hospital, the Company was sent to establish a camp of its own about twenty miles north of Florence Field. The weather there was extremely cold and it rained practically all of the time we were there, and this condition of the weather was much harder on Sergeant Eide than on the rest of us, because of his sickness. Eide was able to "get by" because the rest of us fellows handled the heavy work. At the time I was discharged I noticed that his health had not improved. He was still rather dull and sickly at that time. He still remained in bed as much as possible and complained of headaches and pains in the back of his head.

Cross Examination.

As a matter of fact Mr. Eide did not complain, but only upon insistent inquiry would he tell us what the trouble was, and it was in answer to our inquiries he would tell us that he had these headaches. As I recollect it now they appeared to be continuous. He had them practically all of the time. I do not believe he reported on sick call

(Deposition of Frank A. Barrett.)

after he came back from the hospital. If he did, it was rather seldom. I did not suggest to him that he should report on sick call because after the war was over it was unnecessary to report on sick call to be relieved from duty. Eide returned from the hospital in the fall of the year, towards the latter part of October. I am not sure that I saw him the first day he returned but I remember that he was placed on duty immediately. When he returned from the flu, he took it easy for [23] some time. This was not under anyone's particular direction, but for the reason that when there was any work to do the sergeants would divide the work up themselves. I do not recall ever hearing the captain of our company telling Mr. Eide to take it easy for a while until he felt his strength come back, although I did hear him tell a large number of others. During the first week of Mr. Eide's return from the hospital I saw him eighteen out of twenty-four hours. He was stationed right with me and most of the time he was laying around and loafing on his bunk. If there was any work to perform the officers would direct the first sergeant to designate one of us fellows to take the company out and generally we would volunteer to do that and leave Eide to take it easy. My best recollection is that he spent nearly all of his time in the tent during the first week, except to go about fifty yards for mess. I rather think he went to his meals regularly. This condition changed very shortly after-

(Deposition of Frank A. Barrett.)
wards and he did more work and did a fair share of his work. I was not present when Sergeant Eide was taken sick, nor do I know what symptoms he had. About all I know is that he was taken to the hospital. Afterward I perceived that he had slowed up considerably since his sickness and that he was lifeless and did not have the "pep" and spirit that he had prior to his sickness. He refused to go out to entertainments and parties as he had theretofore and gave as his reason the headache complaint. He would go out occasionally, but not nearly as much as before, but he complained continuously of the headaches until my discharge. I think the weather was harder on him because I was a fairly strong and robust man at that time and he had been sick recently, and the dark, gloomy, cold rainy weather seemed to depress him more than it did the rest of us. This rainy period lasted for about a week. [24] We were then removed to Fort Crook and placed in barracks. He seemed to improve then but did not get in any happier frame of mind. He took it much easier until discharge. He looked all right except that he had lost some weight and did not have the life and "pep" that he had prior to getting sick. In our company I would say that one hundred out of one hundred and fifty or one hundred and sixty men were sent to the hospital with the flu. About fifty died and about fifty returned. Those that returned underwent the same changes as Mr. Eide in so far as they had

(Deposition of Frank A. Barrett.)

to take it easy for a short time after their return from the hospital, but I did not have the occasion to learn of any followup trouble such as headaches from the other men for the reason that I was continuously quartered with Sergeant Eide in the same tent and in that manner learned of his particular trouble. My best recollection is that Mr. Eide was away a month. As far as I recall the method employed in making a sick report in our company was as follows: I have a hazy recollection. If a man complained to the sergeant on duty or any other officers on duty relative to any sickness, then this man was immediately placed on the sick report. He was sent to the company doctor and taken care of. I do not know of any other sickness Sergeant Eide had prior to the time he left the company on the first occasion.

Redirect Examination.

When Mr. Eide left the company, his health as I observed it, was A number one, when he came back it was very poor. I do not recall that he ever complained to me about double vision or seeing double.

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TESTIMONY OF MRS. BERTHA K. EIDE,

a witness produced on behalf of the plaintiff, after first being sworn, testified as follows: [25]

I am the mother and legal guardian of Arthur J. Eide, the plaintiff in this case. My son at the

(Testimony of Mrs. Bertha K. Eide.)

present time is at the Stockton State Hospital, Stockton, California. He was living with me at the time he went to war at No. 1700 McAllister Street, San Francisco, and was working at that time at Davis', the broker's office. He had been working there for four or five years. Before he went away he appeared to be a jolly boy, good natured, seemed he always took everything so good natured, was always jolly and took me out. He appeared very neat. He always had his clothes in good order and his shoes, and was very particular about his presence. I saw Arthur when he returned from the war in January 1919. This was in the first part of January and four or five weeks before he was actually discharged. He had to stay in the Presidio on account of flu. The first time that I saw him he had no expression at all. He looked so different and I says: "Arthur, what's the matter with you?" "Oh", he says, "I left some men down on Market Street", he says, "I have to hurry." He stayed home that time about five or ten minutes. When he came home again he seemed so quiet and said he had headaches. He didn't tell me that the back of his head hurt but he had to go to bed a couple of days at a time and I put water on his head. This was right after he was discharged. Then they got worse all the time and I tried to doctor him up. I thought it was just ordinary headaches, you know, and I put wet towels on his head and tried to do the best I could for him. He had these headaches when he first came back

(Testimony of Mrs. Bertha K. Eide.)

and he had them for three or four years, maybe more than that, really hard headaches. He lived with me when he was discharged until I put him into Palo Alto in 1927. I noticed a fixed stare on his face when he first came home he wasn't the same and he wanted to be by himself. He didn't want to go to see any friends and he was altogether [26] different. He appears to me now to be just the same. I do not think he is crazy, I think he is nervous. I never thought he was crazy and I do not think so now.

Q. You remember when he tried to work for the Southern Pacific up in Dunsmuir?

A. He worked off and on and he come home between times, odd jobs.

Q. How did he appear when you say him when he came home?

A. Oh, he was nervous just the same, just about the same all the time.

I remember when he had the garage. When he went away to war he was jolly and had a good hope for the future and when he came back he didn't think anything about the future, didn't have any expression on his face. He was nervous. If I said anything to him why he—the tears would come in his eyes. He was depressed. I don't know how many jobs he had from the time he came back from the service until he entered the hospital in 1927. In 1919 he went one week at the garage and he was fired out of that and the next thing he was at another garage for about three months. He was

(Testimony of Mrs. Bertha K. Eide.)

night watchman at the garage. He quit because he had severe headaches during all of the time. He had headaches all the time when he was at Dunsmuir but he was a boy who never complained very much, but he just went to bed and just stayed there like a dead person. When I first took him to Palo Alto he was so nervous he couldn't hold a book in his hand, you know, it just dropped out of his hand while he was reading.

(Insurance Policy Certificate number 1841792 introduced in evidence and marked "Plaintiff's Exhibit No. 1" in evidence.)

When Arthur worked in the garage he appeared just about the same, he was very nervous, headaches, and night sweats.

Q. Did you ever try to treat him for any of these things? [27]

A. Well, I treat him like I did, you know, like we used to home made treatment. He was just the same all the time.

Cross Examination

I don't see any difference in Arthur's condition now than it was when he got out of the service. He is very nervous. He couldn't work anywhere and I know it because he tried it after I—Oh I don't know what year it was that he was a night watchman in a place on Market Street and after that he got sick in bed for a long time. When he came out of the Army he went to work at Sansome Street, I think it was, in a garage, 55 Sansome Street. The Mer-

(Testimony of Mrs. Bertha K. Eide.)

chants' Garage. He worked there one week and was fired. Then he didn't do any work for oh, for a whole year, and the next year he got work at Terminal Garage and he was there about three months. That was in 1920. He didn't do anything else in the meantime beside work at the Merchants' Garage and the Terminal Garage.

Q. Did he ever work in Vallejo?

A. Oh, he worked in Vallejo, yes, after that.

Q. As a matter of fact wasn't that in the early part of 1919 as soon as he got out of the Army?

A. Well, maybe I am mistaken. Maybe it was but I know he worked over there for about four or five weeks. It was not three months. I am quite sure it wasn't that long. He also worked up in Reno for the Sierra Auto Company in 1919. I know it was right after he came home from the war but what date it was or what month or year I can't remember. He got a job up there but he came back in a couple of weeks.

Q. As a matter of fact didn't he work for the Sierra Auto Company in Reno from May, 1919, until July of 1919?

A. Oh, no, he wasn't up there that long. [28] He played a little bit of baseball but that wasn't his work all the time.

Q. Wasn't he paid twenty dollars a game for playing baseball?

A. I have heard fifteen but I don't know if it is so or not. I don't know whether he played every weekend.

(Testimony of Mrs. Bertha K. Eide.)

Q. Mrs. Eide, as a matter of fact didn't he first work for the U. S. Housing Commission at Vallejo, then for Sierra Auto Company and then for the Merchants Garage and in the meantime play baseball up at Dunsmuir and Yreka?

A. Well, I can't tell just exactly what dates but I know it was right after he came out of the war that he was up at Vallejo.

Q. As a matter of fact didn't Arthur return from Reno in December of 1919 and go to work for the Merchants Garage in San Francisco in January of 1920?

A. I can't remember exactly the date, you know, but I know I went to see him when he was in the Merchants Garage so I know he was there for one week and then he was discharged.

Q. Did he ever work at Angel Island. He worked one week at the Merchants Garage.

A. One week.

Q. Was he discharged?

A. Yes.

Q. Why?

A. I suppose he had headaches and couldn't do it.

Q. He worked there for one week. You are sure of that?

A. Yes.

Q. You are sure he was discharged?

A. Yes.

Q. Because he had headaches?

(Testimony of Mrs. Bertha K. Eide.)

A. Yes. He told me he was discharged and I went down to see him once, to see how he got along so I know where it was. [29]

It was somewhere down on Natoma Street. I don't remember seeing Mr. Bogel down there, nor Mr. Levinson. I don't know why he left Angel Island. I suppose he had headaches. He worked at Dunsmuir and Yreka for the Southern Pacific Company a couple of years off and on on odd jobs. By that I mean that any time they needed him why he could get in. He was working in the Round House.

Q. As a matter of fact he was working as a fireman, wasn't he.

A. Well, maybe he got in that a while, I know, but that is the first he worked in the shop because he told me he was going up there, he just got a little job off and on, just extra.

I don't know how much money he was making up there.

Q. When he was working in the garage business—When did he go in the garage business with Mr. Hammer and Mr. Richardson?

A. 1922 and 1923, I think it was.

Q. Was he making money?

A. No.

Q. Was he giving you any money?

A. He gave me as much as he could because he lived home.

Q. How much was he giving you?

A. Well, I don't know just about, you know, how much.

(Testimony of Mrs. Bertha K. Eide.)

Q. Was he paying you sixty dollars a month?

A. Yes. That is what he was paying me when he could, you know.

Q. That was in 1923?

A. Yes, 1922 and 1923, I don't know which.

Q. Do you think at that time he was in the same condition that he is in now?

A. Yes, I think he is just the same as when he came out of the Army. I can't believe anything else. He is very nervous [30] and has been since he came out.

Q. For how long a period of time while he was in the garage business did he continue paying you sixty dollars a month?

A. Well, I can't just remember that because that was—He was supposed, you know, to give me—to help me, you know.

Q. And he did, didn't he?

A. Yes, he did all he could.

Q. Was he fairly regular?

A. Yes, he was very good, was very good that way. I never need to ask him. He was good hearted.

Q. As a matter of fact, he was working fairly steady up until 1923, he had various jobs, U. S. Housing Commission, Sierra Auto Company, Merchants Garage, United States Immigration Service, Southern Pacific Company, and then in his own garage business.

A. Well, he didn't stay with it very long.

Q. How long did he stay with the Southern Pacific?

(Testimony of Mrs. Bertha K. Eide.)

A. Up in Dunsmuir, you mean?

Q. Yes.

A. I think he said it was a couple of years but it was just off and on, he didn't get in any time, you know, he didn't work but just odd jobs.

I don't know how much money he was making from the Southern Pacific. When he was working for the J. B. F. Davis Company he was making eighty-five dollars a month. He had been there four or five years. He enlisted in the Army direct from the Davis Co.

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## TESTIMONY OF LUCIA MARTIN,

a witness produced on behalf of the plaintiff, after first being sworn, testified as follows:

I worked for J. B. F. Davis & Son from January, 1914, to April 1929. I first met Arthur J. Eide at J. B. F. Davis [31] & Son in 1914. I knew him very well. I worked very close to Mr. Eide. He helped me with my work and I went out to dinner with him on numerous occasions and the theatre on numerous occasions and out dancing. He was at all times a very cheerful person. He was more than the average in his neatness, immaculate in his appearance, and I could depend on him at all times to help me with my work. He was in the Fire Department and I was in the Fire Department. I would say that he was an intimate friend. Mr. Eide worked steadily, that is, every day there was work to be done. I first saw him after the war in the early spring of 1919. I would

(Testimony of Lucia Martin.)

say in February or March. I spoke to him at that time about fifteen or twenty minutes. He appeared irrational to me. I asked him if his position had been offered to him. He said it had. I said: "Are you going to take it?" He said "No", he wasn't interested in it, it gave him terrible headaches to work and didn't pay to work for other people anyway, you never got anywhere. When I saw him he was rather unkempt in his appearance. He didn't seem to be interested in my conversation. He just stood there and had a fixed stare on his face. He just stared straight ahead of him. There wasn't any expression on his face no matter what I said. He wouldn't smile or laugh. I tried to bring up things we used to talk about and used to be interested in. He just didn't acknowledge them at all, apparently almost to the point of rudeness. He appeared to me to be irrational. So much so that I was really shocked and mentioned it to several of the boys in the office afterward. The next time I saw him was in the garage on Divisadero Street. While he was at Davis' we had often laughed about the time when I would buy a car. He said he would take care of it. I learned through one of the boys in the office he was in this garage on Divisadero [32] Street. I thought if I took it to a person who knew me they would service it correctly. I was in there in the morning on my way to work with the car. He acted as though he had never seen me before. He just stood there and stared off into the corner, never answered me, never spoke to me. Finally I left and

(Testimony of Lucia Martin.)

I worried very much all day about that car, it was a new car and my first car. So when I left the office at five o'clock I thought I would go out and pick up my car. When I got to the corner of Sansome and Pine there was a car standing out almost toward the middle of the street looking very much like my car. I went up and saw it was my license number, my car, with keys in it, and the engine running. It hadn't been cleaned or washed or hadn't been greased, nothing done to it and there wasn't anyone around. Mr. Eide never made any explanation for this. I never saw him again but in 1932 I received two letters from him. I have those letters with me.

(Letters produced by the witness, identified, offered and marked in evidence as "Plaintiff's exhibits Nos. 2 and 3).

I corresponded with Mr. Eide while he was in the service, wrote to him probably once a month or once every six weeks. The last letter that I got from him in the service was a very friendly letter thanking me for a box of homemade candy I had sent him. I received no further letters up until the time I received the two letters which have been just offered in evidence.

Cross Examination

I saw Mr. Eide in 1919 and I would say that he was irrational.

Q. What do you mean by irrational? [33]

A. Well, a person you would know very well, were friendly with, who had always been so cour-

(Testimony of Lucia Martin.)

teous to you should suddenly come in and try not to speak to you, just stand there and stare into space no matter how hard you tried to get his attention in conversation, refuse to talk to you. He was almost rude in his inattention and indifference. That I call irrational.

I did not attribute his conduct to the fact that he wasn't interested in me any more because I was not [34] engaged to him at any time. I didn't go with him to the exclusion of other young men, or he didn't go with me. It was just a friendship. On the day that I saw him I was in his company for fifteen or twenty minutes. At that time he was offered his old position, they offered the boys who came back from the war their positions back in our office and he was offered his back. I wouldn't have offered him a position. I formed the opinion then that he was insane. I took my car to him later as I heard he was in the garage business. I felt sorry for him. I thought if he had pulled himself together, now that he could get in this garage I would help him out. He wasn't friendly there. He wasn't pleasant or courteous. He stood there and stared, a fixed stare on his face. This alone didn't cause me to think he was insane.

Q. The fact he was rude didn't cause you to think he was insane, did it?

A. No.

Q. But he stared.

A. Yes.

(Testimony of Lucia Martin.)

Q. What else did he do beside staring?

A. He kept staring first one way and then another way as though someone were after him and he wanted to bolt out of the place.

Q. What else?

A. Well, the manner of answering me, his answers.

Q. Give me the questions and the answers.

A. Well, I said: "Arthur, are you going to take your position back? No. Why not? Gives me headaches to work. There is no use in working for people anyway, you never get anywhere anyway."

Q. Now, let's take that then. You asked him "Are you going to go to work? No. What is the use of working, don't get you [35] anywhere anyway." That didn't cause you to think he was insane?

A. Yes, it did, and having known him before.

Q. That is what caused you to think he was irrational together with staring?

A. Yes.

My definition of irrational is a person who doesn't act in a sane, sensible, rational manner. I said that Mr. Eide was not sane because I have never had anybody come and stand and stare and act as though they wanted to bolt away when I am trying to talk to them, act as though somebody were after them. He acted offish toward me and there was a marked difference in his personal attitude. I also noted that he kind of stared and looked around and so forth. He could not carry on a conversation with me. I

(Testimony of Lucia Martin.)

tried my level best. He answered me abruptly. He seemed to have lost interest in me and in the work and in everything.

Q. Now, if you would make the acquaintance of a gentleman and you would be friendly and after a matter of two years would go by and you would meet him and he would be abrupt, indifferent, cold, rude, improvident instead of looking at you and being interested in your talk, would be looking at someone else, would you under those circumstances come to the conclusion that such person would be insane?

A. Well, there are different ways——

Q. (Interposing): Answer yes or no.

A. The way you have described it I would say no.

Q. You would say no.

A. Yes.

Q. You would not come to the conclusion he was insane?

A. No.

Q. Have I described all the things you observed that day? [36]

A. No.

Q. What else was there?

A. It wasn't just a coldness or rudeness or indifference, it was an expressionless stare, a mask-like face, a face without an expression like an insane person.

Q. Let's include that information as we refer to this imaginary man, say he would have a blank ap-

(Testimony of Lucia Martin.)

pearance on his face, a harried expression and a blank stare. Would you then say such person or man is insane?

A. Yes, I would.

I would describe Mr. Eide's look as vacant and shifty. I have not seen him during the last three years. The last time I saw him was when he was in that garage on Divisadero Street. That morning when I took my car there I tried very hard to talk to him. His appearance was just the same. He was just as hazy one time as he was at the other time. I certainly would not have employed him in my service in the Fire Insurance.

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## DEPOSITION OF DR. R. L. RICHARDS.

The deposition of Dr. R. L. Richards, a witness for the plaintiff, was read in evidence and the same reads as follows:

My name is Dr. R. L. Richards. I reside at No. 40 San Ysidro Lane, Santa Barbara, California. I am licensed to practice medicine in the States of California and Ohio. I graduated from the University of Cincinnati in 1894. From 1902 to 1912 I served as a medical officer in the United States Army. I resigned in 1912 and became medical superintendent of the Mendocino State Hospital and remained in that capacity until 1921. This hospital is also kown as the California State Hospital for

(Deposition of Dr. R. L. Richards.)

the insane. In addition to [37] this, while I am not sure of the date, I was consultant of the Marine Hospital Public Health Service for a good many years, beginning, I should think, about 1922 I was Consultant of the Veterans Bureau Twelfth District. I have not been active in that work since 1927. My specialty is psychiatry, that is, nervous and mental diseases, and I have followed this specialty since 1909. I am practicing at the present time here in Santa Barbara, California.

I examined Arthur J. Eide professionally on May 16, 1929, when his mother brought him to me and I examined him and gave advice as to treatment. From the nervous and mental troubles, his family history, his personal history, present condition, examination, diagnosis and treatment, I found that Eide was definitely mentally sick; by that I mean that he was suffering from neuropsychiatric disease. He was a case of dementia-praecox and treatment was followed up at the hospital. Mrs. Eide gave me a history, however, of influenza in 1918, disability following that associated with excessive sleepiness, attacks of dizziness, lack of initiative and inability to hold a job. That this had varied in different years; that at some times he was worse but never better and I found him to be a man very difficult to arouse. He answered questions not at all or after considerable delay but when once stimulated he answered promptly and quickly and seemed to be interested in making a

(Deposition of Dr. R. L. Richards.)

correct answer. He was not apathetic, he had no peculiar mannerisms which are characteristic of dementia-praecox cases of the duration that he said his was. My impression was that the man had had an acute infectious attack in 1918, that it might have been and probably was encephalitis lethargica. It would not preclude the dementia-praecoxlike symptoms which he had at the time that I saw him. He did not show negative tendency to do the opposite thing. I didn't find at [38] the time any motor weakness which you often find, I mean a slight paralysis which you find at times with encephalitis. The deduction from that was that the cortex had suffered more than the lower centers of the nervous system. The cortex is the thinking part, the outside of the brain.

Q. (By Mr. GERLACK): Doctor, I will give you this definition of permanent total disability. Total disability is to find there is an impairment of mind or body that prevents the disabled person from following continuously any substantial gainful occupation and total disability shall be deemed to be permanent whenever it is founded upon conditions that render it reasonably certain to last throughout the life time of the disabled person. Bearing in mind that definition, I will ask you first, whether in the purview of that definition, you have an opinion, first, as to whether or not Arthur J. Eide at the time you examined him as you have

(Deposition of Dr. R. L. Richards.)

testified here, was permanently and totally disabled within that definition?

A. I have an opinion.

Q. What is your opinion?

A. That he is permanently and totally disabled.

Q. That he was at the time you examined him?

A. He was at the time I examined him, yes.

Cross Examination

The first time I ever saw Mr. Eide was when his mother brought him to me on May 16, 1929. Most of the history I obtained from his mother. She said it was based on her knowledge. I can't tell you at this time how much of the history she gave me, but in general I should say three-fourths at least came from the mother. It was very hard to stimulate the man. My recollection is that Mr. Eide told me the way he felt and certain of his occupational record, confirmation of [39] the time of enlistment and time of discharge. I described his ailment as dementia praecox. I said a good deal about the dementia praecox and certain peculiar things about it which made me wonder whether it was a straight dementia praecox or due to infection. By dementia praecox I mean a mental disease which usually occurs relatively early in life and therefore is precocious and generally continues to a dementia which may last for years after the beginning of it. That is associated with many symptoms. There is a withdrawal from contact with the surroundings, there are oddities and peculiarities of conduct, at times

(Deposition of Dr. R. L. Richards.)

there are hallucitory and delusional manifestations and usually if you are not dealing with an acute infectious organism, you find a steady sort of a progress without fluctuation to a degree that this case seemed to show. That was the thing that struck me, he was not apathetic, he was interested in what was happening but he would sit without saying anything until you asked him in a loud tone of voice or insisted upon an answer, at which time he answered correctly and quickly and during that period seemed interested. There was no negativism or tendency to do the opposite thing from the thing which you asked him. He had nothing of the peculiar rhythmic movement of the hands which often happens with them.

My examination consisted in examining the cranial nerves, the reflexes, what is usually meant by physical examination, the question of heart and lungs, muscular power, his contact with surroundings, any evidence of false sense perception or delusional trend, his recollection of things, his apparent mental capacity at the time. I found that the reflex actions were normal. His heart and lungs appeared to be normal, he seemed to have a fairly high blood pressure, 160 over 110 at that time. He did not appear to be normal, [40] more from the mental angle probably than from the physical, I mean the man's indifference, the difficulty in contacting him. The main thing that I found that was particularly noticeable physically was the high blood pressure. I found no motor paralysis. The

(Deposition of Dr. R. L. Richards.)

difficulty, as I said before, was a cortical function rather than peripheral. There was a small part of the history that I could get from him. I didn't say that he was inaccurate or had memory defect in what he told me but it was very difficult to get him to answer a question.

Q. Was it a question that you could not get it from him or was it a question that the mother being there took the lead in telling you the history?

A. It wasn't the presence of his mother because I learned to exclude her.

Q. Did you exclude her in the beginning?

A. I don't mean exclude her from the room but I went direct to the man, tapped him on the back and spoke to him more loudly and demanded an answer from him disregarding the mother.

I have no way of knowing how long he had been in this condition except from what was told me. But I was impressed more with the question that even if they had been trying to deceive me, they gave a history that connected and seemed logical from beginning to end and I didn't think they knew enough about medicine to do so.

Q. But, Doctor, isn't this a fact, that one who has formerly held jobs steadily and with satisfaction and later drifts into the habit of being unable to hold a position, isn't that brought about sometimes by association as often as it is by anything else?

A. I don't look at it from that angle, I am much more individualistic than that. A person is a definite something to me, he has functioned in a certain way

(Deposition of Dr. R. L. Richards.)

prior to a time and particularly if he has gone up to the age of twenty-four before he [41] enlisted, he is pretty well formed. If after discharge he should happen to go with Tom, Dick and Harry and sit around with veterans of the foreign war, I should think there was a basis for it, it would take more evidence of it, at least that was our experience at the time of the war, I had charge of the West Coast and I saw a lot of that. I wouldn't think the man was contaminated by association, no, in this particular case.

Q. Now, you would not be able to say, Doctor, whether this condition was brought about by influenza or not, would you?

A. I could only say that it would be brought about by that. I realize that I have not all the information, if that is what you mean.

Q. That condition that you found this patient in isn't a frequent result of influenza at all, is it?

A. It isn't an infrequent result and it is a well known fact that you do have that sort of a condition following the influenza.

Q. You could likewise have it in many cases of people who have never had influenza?

A. That is quite true.

Q. And you would have it in many instances where there is no history of any previous sickness?

A. Quite true.

## STIPULATION

(Mr. GERLACK): If your Honor please, for the purpose of the record I have agreed to stipulate with Mr. Lynch—Mr. Lynch and I can agree upon certain of the pleadings that we haven't heretofore discussed. It is admitted, Paragraph 1 is admitted that at the time suit was commenced he was a resident of Siskiyou County in the northern district.

The COURT: You admit Paragraph 1? [42]

Mr. LYNCH: Yes, admit Paragraph 1.

Mr. GERLACK: Paragraph 2.

Mr. LYNCH: Admit Paragraph 2.

Mr. GERLACK: Paragraph 3.

Mr. LYNCH: Admit Paragraph 3.

Mr. GERLACK: Admit Paragraph 4, that he had the policy and it was in full force and effect up to and including midnight of July 1, 1919.

Mr. LYNCH: Yes. We admit Paragraph 5.

Mr. LYNCH: Deny Paragraphs 5 and 6.

Mr. GERLACK: You admit that claim for insurance was made on April 22, 1929, and that disagreement was made by the Veterans' Bureau on June 29, 1932?

Mr. LYNCH: Yes.

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## TESTIMONY OF DR. FRED J. CONZELMANN,

a witness produced on behalf of the plaintiff, after first being sworn, testified as follows:

I have been in the psychiatric practice or study of mental and nervous diseases since 1912. I am a graduate of Michigan University and Ann Arbor

(Testimony of Dr. Fred J. Conzelmann.)

Medical School. I graduated in 1905 and then I was five years in the Army as a lieutenant and then I left the Army and went into civil work. I have been since 1916 at Stockton State Hospital except for eight months that I was at Camp Kearney in the service during the war. My specialty is neuro-psychiatry and the treatment of mental and nervous diseases. I am at the present time employed by the State of California on the staff at the Stockton State Hospital for the Insane. I am the ward surgeon of Mr. Eide. He was admitted June 4, 1932, and he has always been on my ward and he was out from September 29, 1932, to January 9, 1933, and since then he has been back for over a year, [43] always on my ward. I see him nearly every day. His present diagnosis is dementia praecox, paranoid type. This is a disease of the adult. Science has not discovered the cause of the disease. Its usual course is very gradual, extending over months or years before it fully develops and there is usually an oddity of conduct, rudeness and explosive episodes, feeling that he is discriminated against or people are against him, and then they develop ideas that people are actually persecuting them or getting them out of jobs, very likely to change jobs suddenly without any particular cause. We find it has just been their own idea that somebody is having it in for them, and then as they go on and develop various ideas. Very often they have grand ideas that they have great wealth or they can have an invention and they can communicate through the

(Testimony of Dr. Fred J. Conzelmann.)

air with chemical substances, don't need a radio or telephone to talk distance and some have ideas they are God or Christ or John the Baptist or Mary, the Virgin Mary. Some of their inventions, usually something impossible about it, and then they have often mind influences and thought feeling or thought reading and the like. Mr. Eide tells us that he hears voices out of the air, they call him very bad names, so bad sometimes he doesn't want to repeat them, and frequently states he can communicate with the Government just by shouting out loudly and he has these explosive episodes and he sometimes suddenly gets up from the chair, runs up to the wall and kicks it and then runs away from the wall and always asks about when he is to be let out, he is not insane, that people are jealous of his inventions.

Q. Doctor, have you seen Plaintiff's Exhibits 2 and 3 here?

A. Yes.

Q. Have you also seen Mr. Eide drawing like that?

A. Yes, he has at various times. He has made certain draw- [44] ings at the hospital that he says is an invention.

He has not invented anything that we have ever found out.

Mr. GERLACK: If your Honor please, I offer in evidence at this time the definition of permanent and total disability.

The COURT: Received as No. 4 for the plaintiff.

(Testimony of Dr. Fred J. Conzelmann.)

(The document to which reference last above is made was received in evidence as Plaintiff's Exhibit No. 4 and the same is herein set out in words and figures as follows, to-wit:

"(TREASURY DECISION 20 W. R.)
TOTAL DISABILITY

Regulation No. 11 relating to the definition of the term 'total disability' and the determination as to when total disability shall be deemed permanent.

TREASURY DEPARTMENT
Bureau of War Risk Insurance
Washington, D. C., March 9, 1918.

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act the following regulation is issued relative to the definition of the term 'total disability' and the determination as to when total disability shall be deemed permanent;

'Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in articles III (relating to compensation) and IV (relating to insurance), to be total disability.

'Total disability' shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. [45]

(Testimony of Dr. Fred J. Conzelmann.)

'Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV (relating to insurance) on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation, the payment of installments of insurance shall be discontinued forthwith, and no further installments thereof shall be paid so long as such recovered ability shall continue.'

WILLIAM C. DeLANCY,
Director

APPROVED:
W. G. McADOO
Secretary of the Treasury."

Mr. GERLACK: Doctor, reading you this definition of permanent and total disability which is a part of the policy sued upon here and which has been introduced in evidence as our Exhibit No. 4, "Total disability is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed to be total disability. Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it." Now bearing in mind that definition, Doctor, do you believe that Mr. Eide is now permanently and totally disabled under that definition?

(Testimony of Dr. Fred J. Conzelmann.)

A. I believe that he is now permanently and totally disabled, yes sir.

Q. Do you believe there is a probability that he will recover and be cured?

A. I do not think so.

Q. You have sat in the courtroom and heard all the testi- [46] mony this morning I believe?

A. I have.

Mr. GERLACK: We submit at this time these—Let's see, one, two, three, four, five—five medical examinations that were handed to me by Mr. Lynch from the government files of examinations taken at the United States Veterans' Hospital at Palo Alto, California, of the plaintiff here. We offer these as Plaintiff's exhibits in order.

The COURT: They will be received as No. 5 in evidence and be marked, I suppose, respectively 5a, b, c, d, e.

Mr. GERLACK: That is agreeable.

(The documents to which reference last above is made were received in evidence and marked Plaintiff's Exhibits 5-A, 5-B, 5-C, 5-D, 5-E respectively and the same are herein incorporated by reference as if they were set out in words and figures.

Mr. GERLACK: Doctor, have you examined these exhibits?

A. I have read them through, yes.

Mr. GERLACK: I will ask that these—May I read these to the jury, your Honor, parts of these?

The COURT: What are they, mental examinations? I didn't understand you.

(Testimony of Dr. Fred J. Conzelmann.)

Mr. GERLACK: May I read parts of these?

The COURT: Parts of Exhibit 5.

Mr. GERLACK: No. 5, I guess it would be A, Mr. Clerk.

The COURT: If you will define what it is.

Mr. GERLACK: Yes. Plaintiff's Exhibit 5-A. "Report of Neuropsychiatric Examination. Patient Admitted October 30, 1927". This is dated November 1st, 1927. "Diagnosis: Dementia Praecox, catatonic [47] type". What was that, Doctor?

A. That means that they are in sort of a daze, a stuporous condition. Often will not eat, even refuse food, and may entertain a saliva so that it is drooling out of their mouths and often retain urine and feces.

Q. "Treatment Recommended: Hospitalization. Is he competent? Answer, No. Remarks and recommendations: Patient was presented to staff conference November 30, 1927 and the diagnosis appearing above concurred in by all members. He is considered insane and incompetent." That is dated November 30, 1927.

"Present Complaint: No spontaneous complaints. In answer to questions what his complaints were, he said, 'Nothing. Don't feel sick. Never noticed any change in condition. I am like I always have been.' Summary: Patient apparently normal child. Gonorrhea prior to service. Had influenza in fall of 1918 in Base Hospital for six weeks. Denies delirium or double vision. Recovered and returned to duty, after which promoted to sergeant. After discharge had trouble holding jobs. Was let out;

(Testimony of Dr. Fred J. Conzelmann.)

four years ago, began to have headaches about the same time noted his queer conduct and remarks. Gradually became less efficient. Would remain in bed all day. Sit and stare without speaking for long time, manifesting no interest. At present some impairment of memory. More or less stereotyped movements and negative answers to questions."

What does that mean?

A. Negative answers to questions?

Q. Stereotyped motions.

A. Repeats certain things, movements of the hand, repeats it all day.

Q. "Dulling of emotional tone. Apparent blocking of thought [48] processes, flexibility of muscles with marked catalepsy."

A. Catalepsy is when he would have a certain condition of the body and you can place the body in any position and then they retain it for quite a long period of time. Often they hold up their arm until by the act of gravity it drops down.

Q. "Impairment of judgment and lack of insight suggest the diagnosis of dementia praecox, catatonic type, however, residuals of encephalitis must be excluded." What is encephalitis, Doctor?

A. Encephalitis is—Encephalitis means the brain, Latin word or medical word, and means an inflammation of the brain, and in 1918 we had great epidemics of flu and at the same time we also had epidemic of encephalitis where the individual would pass into a stupor and sleep for a long time and we call that encephalitis or sleeping sickness.

(Testimony of Dr. Fred J. Conzelmann.)

Q. It continues, "Presented as dementia praecox, catatonic type. Insane and incompetent." Plaintiff's Exhibit 5-B, Report of same hospital dated February 20, 1928. "N.P. Diagnosis: Dementia praecox, catatonic type. Is he competent? No. Patient was granted a ninety day furlough effective February 20, 1928. He is considered insane and incompetent. Mental examination: Rather careless in personal appearance. Will sit for hours doing nothing, reads a great deal. Answers are rather stereotyped, and seems rather embarrassed. No insight into his condition. Answers most questions with yes or no. Thinks that he is here for his specific urethritis treatment. Answers questions well but slowly. Marked dulling of emotional tone. Reactions to questions delayed. Associations slow. Shows marked cataleptic attitudes. At times speech is explosive in character. Impairment of memory. Flexibility of muscles with marked catalepsy has been noted in previous examination. [49]

"Neurological examination: Facial stare——" What does that mean, "facial stare"?

A. Well, a facial stare—Well, I imagine on the neurological side there it has reference to a certain mask-like expression of the face that sometimes a patient has.

Q. You have heard these witnesses state he had such a peculiar expression to his face after the war when he came back first.

A. Yes.

Q. Was that the sort of thing you find now?

(Testimony of Dr. Fred J. Conzelmann.)

A. Well, he has a blank expression. He takes no interest now, just indifferent. Occasionally shouts out the window and dances around.

Q. "Facial stare, palpebral fissures wide, seldom swallows and often has siallorhoea." What is that?

A. That is saliva drooling from the mouth. They don't swallow it. They are apathetic and indifferent and lack of energy and the saliva drooling and sitting still.

Q. No motor or sensory disturbances noted. Tongue slightly tremulous. Voice monotonous with no speech defect. All other neurological signs normal.

"Serological report: Negative throughout."

What is that?

A. That is, I suppose they included the Wasserman, test the blood and also the spinal puncture, taking fluid away from spinal canal and examining for the number of cells and reaction of various chemicals which will show whether the individual is suffering from organic diseases and used, of course, it is one which shows syphilis.

Q. The next examination is dated June 11, 1930. "Diagnosis: Dementia praecox, catatonic type. Treatment recommended: Continued hospitalization. Is he competent? No. If not [50] approximate date of beginning of incompetence? 1919" with a question mark after it. "Remarks and recommendations: Patient was presented to staff on June 9, 1930, the diagnoses above mentioned agreed to by all members. It is the opinion of the staff that patient is

(Testimony of Dr. Fred J. Conzelmann.)

psychotic and incompetent, permanently and totally disabled." What does psychotic mean?

A. That refers to a mental disability. Insanity is the legal word and psychosis is the medical term. And they use psychosis, that means that he has some symptoms of mental disease there.

Q. "Laboratory Reports: Urinalysis, casts, none seen. Reaction acid, albumen heavy trace. R. B. C. few". What is that?

A. Red blood corpuscles.

Q. "Specific gravity 1.026."

A. That is normal.

Q. "Sugar negative. W. B. C."—What is that, white blood corpuscles?

A. Yes.

Q. "Fifty per field." Is that normal?

A. Well, that is rather high, I should think, if it was in the urine.

Q. "Feces negative. Blood Wasserman negative."

A. Didn't have syphilis.

Q. "Urinalysis: June 13, 1930: Reaction, acid; casts none seen; mucous, moderate; albumen slight positive trace; R. B. C. few; W. B. C., moderate.

"Summary: Patient's birth and early life normal. Had the usual diseases of childhood with no complications; completed eighth grade and then two years in commercial school. Started to work as bookkeeper, then as a clerk. Social history states, while he changed jobs he was never idle, always working. Entering army, not over seas, but was promoted

(Testimony of Dr. Fred J. Conzelmann.)

to [51] First Sergeant. Received an honorable discharge. Returning to home went to work washing cars but only on job two weeks; got another job as bookkeeper but in two months let out, was too slow. Played baseball for month, then with S. P. R. R. Company as an extra for two and a half years; went to work in a garage. Social history states: 'Domestic in tastes, used to enjoy helping his mother around house, blackening the stove, etc. Was extremely fond of his sister and mother, stated that she had always been of the opinion if this sister had remained at home Arthur would never have looked at another girl.' When patient first returned home complained of headache. Often would lie still with eyes closed and would not move. In 1923 had a recurrence of his former headaches. In that same year, social history states 'Patient was very nervous, delusions of persecution were elicited, and he seemed paranoid towards one of his partners in garage business.'' What does that mean, paranoid?

A. Paranoid, odity, that they are against them and chasing him or following him.

Q. ''Then at home would only answer questions if mother spoke to him. Would sit at dinner table, hands folded and stare at table. In 1926 he went to Idaho with mother. There he paid no attention to anyone. Went to Seattle. Hardly ever spoke to anyone, seldom smiled. In 1926 his behavior was such that a court order was obtained to keep him away from his garage. He remained at home until transfer here. When admitted, note states: 'Neat, his

(Testimony of Dr. Fred J. Conzelmann.)

attitude constrained, expression sad.' Was oriented. There was a masked face and is drooling." What is that?

A. Masked face. Possibly a mask-like face, sort of fixed face, and drooling saliva.

Q. That runs out of his mouth?

A. Yes. [52]

Q. "Seclusive, apathetic. Before staff careless, showed no initiative, face expressionless, speech brief; answered all questions by 'Yes' or 'No', emotionally flattened." What does that mean?

A. Well, I suppose dull.

Q. "Diagnosis of dementia praecox, catatonic. Patient since has been under supervision, periods when he has refused to eat, untidy, careless, yelling, standing for hours in middle of floor; then again, neat, clean, and able to work in occupational therapy,—negativistic, and again presented as dementia praecox, catatonic."

The next examination is Plaintiff's Exhibit No. 5-D, Report of the Veterans Hospital at Palo Alto dated July 16, 1931.

"Military History: Drafted May 17, 1917. Served at Monterey, California, Camp Green, Fort Omaha. In hospital six weeks with 'flu'. Discharged at the Presidio January 29, 1919. Honorable.

"Present illness, probable cause, and so forth. Had severe headaches when he returned from the service in 1919 and for some time thereafter. Had difficulty in holding positions. Was unable to hold any position for any length of time. Headaches re-

(Testimony of Dr. Fred J. Conzelmann.)

turned in 1923 and was observed to act queer, make unusual and peculiar remarks, gradually he had become less and less efficient. Would remain in bed all day, sit and stare without speaking for long periods and manifest no interest. Became very slow and inactive. Gave up completely in 1926 and was admitted to U. S. V. Hospital, Palo Alto, California, October 30, 1927. Diagnosed dementia praecox, catatonic and during his period has manifested typical symptoms including cerea flexibilities,"——

A. That is the catalepsy, when they can be placed in any [53] position and they retain that position for a long time. Often you put them in an awkward position and they will retain it.

Q. "Inactiveness, excitement, quietude, retardation, lack of insight and impaired judgment having passed through two periods of excitement and completed two cycles of catatonic manifestations and final release from hospital on trial visit with his mother while in partial remission and discharged at her request.

"Physical examination: Well developed, well nourished ambulant adult white male with brown hair and brown eyes, 66¾ inches in height, weight 135 pounds. Robust. Psychiatric or neurological examination: No abnormal neurologicals. Rather mask like facial expression; knee jerks active. Patient is slow, retarded and disinterested. Slightly manneristic, delusions of impending harm. Hallucinates, flattened emotionally, talks to self. Associa-

(Testimony of Dr. Fred J. Conzelmann.)

tions slow. Psychomotor activity decreased at time of going on trial visit.

"There is slight increase in density over the right apex with a few calcified deposits along the finger radiations in this area. Dementia praecox catatonic. Occupational therapy, physio-therapy, psychotherapy, indicated medication."

Next is Plaintiff's Exhibit No. 5, Report of Neuropsychiatric Examination. Discharge examination by Board of Three at Palo Alto Hospital, dated July 19, 1931, Dr. R. H. Leece, Dr. F. L. Wright and Dr. Hugo Mella, Clinical Director. I will just read the summary: "Apparently no mental disability in determinants."——

Mr. HJELM: What was that?

Mr. GERLACK: This says: "Apparently no mental disability in determinants."

A. That means ancestors, in the stock from which he came.

Mr. GERLACK: I see. "Patient's birth and early [54] development normal. Measles was the only disease of childhood of record. No complications or sequellae."

A. That means what follows.

Q. "Education normal, no conflicts, two years of commercial high school. Satisfactory employment and adjustment to civil life prior to service. Contracted gonorrhea when twenty years of age. Under treatment two years. Had influenza during service six weeks. Denies double vision or delirium. Returned to duty after which was promoted to

(Testimony of Dr. Fred J. Conzelmann.)

sergeant. Following discharge had dreadful headaches and had difficulty holding positions. Was let out in 1923 and began to have headaches again about the same time and was observed to act queer and make unusual and peculiar remarks. Generally he had become less and less efficient. Would remain in bed all day. Sit and stare without speaking for long times and manifest no interest. Would not enter into games on tennis court but would bat tennis balls around without purpose. Became very slow and inactive. Admitted to U. S. Veterans Hospital, Palo Alto, California, October 30, 1927.

"Diagnosis: Dementia praecox, catatonic type based upon thought blocking, retardation, cerea flexibilis, lack of insight and lack of judgment, quietness, seclusiveness. He also had facial expression suggestive of encephalitis lethargica."

A. That, of course, is sort of mask-like expression that often developed after a person had inflammation or the disease of sleeping sickness.

Q. "During his period of hospitalization he twice manifested catatonic excitement for few months at each time and quickly changed to periods during which catalepsy was manifest. At time of going home on trial visit he was in fairly good touch with his surroundings but was yet slow, manneristic [55] and showed regression. His mother reports he has shown slight improvement since but as yet only occupies himself leisurely, taking no interest in making an industrial adjustment and that his social adjustment is one that still requires family super-

(Testimony of Dr. Fred J. Conzelmann.)

vision and that she wants to keep him with them in the hills and near streams where she feels he will continue to improve. He is considered to be psychotic and incompetent. Permanently and totally disabled. Psychosis only in slight partial remission.''

If your Honor will indulge me a moment.

Mr. HJELM: If it refers to insanity since 1927 it is not necessary.

Mr. GERLACK: Well, I won't take the time to read it now.

Q. Now, Doctor, you have heard the—You have sat in the courtroom and heard the evidence here.

A. Yes.

Q. Now, assuming this evidence that you have heard in the courtroom to be substantially correct and accepting that as the history of the case and accepting these government records, hospital records at Palo Alto, and taking that in connection with your own examination have you an opinion as to whether or not the man was totally and permanently disabled in the spring of 1919 prior to the lapse of the policy on midnight of July 1, 1919? The question is whether you have an opinion.

Mr. LYNCH: Well, we object to the question because it purports to be a hypothetical question and we feel it is improper inasmuch as it doesn't contain all the facts. It is based on reports only portions of which were read and Mr. Gerlack is assuming that all the evidence is in in the case. On those grounds we object and hold it is not a proper hypo- [56] thetical question.

(Testimony of Dr. Fred J. Conzelmann.)

The COURT: Well, probably the matter hasn't been approached in the way it should be. Of course it compels him to accept the statements of others. I have no objection to the doctor testifying as to his own observations, also as to certain testimony given by witnesses here as to observations at certain periods and taking those observations as being true in conjunction with his answer establishing, if he can, the condition of the plaintiff at any particular time. It should be approached that way. There are conclusions in the examinations here and the doctor shouldn't be compelled to accept—Do you believe you are in a position, Doctor, to pass upon the condition of this plaintiff at the present time as to whether he is totally and permanently disabled?

A. I believe that from——

The COURT: Interposing: No. I say do you believe you are in a position?

A. Yes, yes.

The COURT: Do you believe he is at the present time?

A. I believe he is.

The COURT: And do you believe that you have heard facts testified to in this court which—I believe you have been here all during the trial——

A. Interposing: Yes.

The COURT: By the witnesses as to their observations——

A. Interposing: Yes.

The COURT: Which I presume such observations that were made have been consistent in your determination of the present condition.

(Testimony of Dr. Fred J. Conzelmann.)

A. Yes.

Q. Do you believe sufficient facts have been testified to for you to trace back this condition as having existed in years past? [57]

A. I believe that.

The COURT: Do you believe you are justified in tracing back this condition of permanent and total disability due to the present condition of the plaintiff?

A. In my opinion the disease began after he had this influenza or what is called flu at the time in the Army.

The COURT: Yes, but at what point do you believe it had attained such a magnitude as to constitute permanent and total disability, that is merely tracing back the origin?

A. Well, I believe that—As soon as the thing begins then they are totally disabled, but I believe this man as soon as he had recovered from his acute physical illness, his mental condition, however, he was totally incompetent.

The COURT: Prior to his discharge?

A. Yes.

The COURT: From the service.

A. Yes.

The COURT: This sort of an ailment, dementia praecox, is prenatal, isn't it, that is a condition which is in the person which is prenatal merely waiting for a time or a certain break-down to bring it into full activity, isn't that correct?

A. Yes. We usually speak of it as a predisposition inherent in the individual.

(Testimony of Dr. Fred J. Conzelmann.)

The COURT: At birth.

A. Well, it may be one through some sickness during the lifetime or early childhood illness and the early training of the child will cause it to develop this disease.

The COURT: Dementia praecox of itself very frequently is individual at birth, is it not?

A. No.

The COURT: You don't think so.

A. I don't believe—We will say it is in youth. Praexo [58] means youth. Usually in early youth we find it but often it will show no evidence.

The COURT: No, I am not questioning the evidence, but isn't it a condition that exists in the person waiting for something to occur which will make a certain breaking down and produce it actively so you will discover it?

A. Yes. In dementia praecox we will make the predisposition there but if conditions are not favorable it will not occur.

The COURT: It is your conclusion that as soon as the symptoms of what you consider dementia praecox appear that a person is totally and permanently disabled no matter if they actually are engaged in a vocation?

A. Yes.

The COURT: No further questions by the Court.

Mr. GERLACK: Well, now, Doctor, you say you have an opinion.

A. Yes.

(Testimony of Dr. Fred J. Conzelmann.)

Mr. LYNCH: He has already given that opinion.

The COURT: I think he has answered it.

Mr. GERLACK: Will you tell us about the disease of encephalitis lethargia, what it is and how it acts?

A. Well, this encephalitis lethargia is, of course, a sleepy sickness where the individual becomes drowsy and sleeps. That was in the first cases to be observed they found the condition, but later they found some of them were merely excited or in delirious stage that would have to be confined in a hospital for mental sickness. Of course, when it passed off we sometimes have residual effects, paralysis of one arm or one side of the face or of one leg, or we have peculiar tremors and the individual stands in one position and holds his arm very stiff and we call it Parkinson's disease or Parkinson's illness, paralysis, and it occurs [59] after encephalitis. The whole brain is involved, the instrument of the mind, the member that controls our emotions and naturally when the nerves are inflamed why it would be responsible for the peculiar attitude.

Mr. GERLACK: I think that is all.

The witness was taken for

Cross Examination

By Mr. HJELM:

Q. Now, Doctor, would the fact that the plaintiff was discharged from the army in 1919, January 1919, showing no disability, would that be information that you would want to take into consideration

(Testimony of Dr. Fred J. Conzelmann.)

in arriving at the conclusion that you have come to?

A. Yes, that would have to be taken into consideration.

Q. Assuming it to be a fact that his discharge shows an entry that he had no disability, would that cause you to wish to reconsider the opinion that you gave?

A. No, sir.

Q. You would still come to the same conclusion?

A. That is the way that he was discharged. I have discharged many hundreds of them in one day. We didn't make much of a mental examination at Camp Kearney. They went through in a hurry. We discharged them and put down "They are physically well."

Q. Did you examine this man at Camp Kearney?

A. No.

Q. In other words, the examination you made there at the time they were discharged didn't amount to much?

A. Well, just in a general way. We didn't spend a half an hour examining a person for his mental condition or if they had delusions or hallucinations. If he appeared well and if he didn't complain, we thought he was all right.

Q. Well, Doctor, if he was at the time totally and permanent- [60] ly disabled from a disease known as dementia praecox, would not his facial expression, as you have related, have indicated a blank appearance at that time?

A. Well, it may have, yes, but it isn't necessary to have that because they look sometimes entirely normal in the dementia praecox.

(Testimony of Dr. Fred J. Conzelmann.)

We do not make a diagnosis of dementia praecox on one symptom. We do not decide the case on one symptom no more than we decide a person's character by one act, single act. We must have the whole life, take the whole life into consideration. You have to take all the things in the aggregate. We usually get a whole life's history, but it is not absolutely necessary to have the history of his youth to make a diagnosis.

Q. Was it necessary at all?

A. Well, we usually try and get it.

The COURT: The point is this, it might be interesting or it might be confirmatory of your views to have other and different testimony than that presented in this case. What he is asking you is the direct question, is it necessary for the purpose of reaching your conclusion that you have expressed here to have any testimony or have any facts in your mind other than those that have been testified to?

A. No.

Q. Well, when you testified in response to questions from counsel, did you have in mind the facts you have down at Stockton and you took it into consideration?

A. Yes.

The COURT: Interposing: Just a minute. I will ask this question and I will entertain your motion. Then to reach the conclusion that you have given here today in court [61] you have taken into consideration, you find it necessary to take into con-

(Testimony of Dr. Fred J. Conzelmann.)

sideration data which has not been testified to by witnesses, is that correct?

A. No, sir. The things which were testified to by the mother and Mrs. Martin——

The COURT: Interposing: Are you prepared now to say your conclusions which you have expressed here as to the existence and duration of this disease, you are willing to state they are correct without taking into consideration anything else but what is testified here?

A. I do.

The COURT: You say that right now?

A. Yes.

Q. (By Mr. HJELM) At the time you answered the question propounded by plaintiff's counsel you did take into consideration the fact that you had at hand by virtue of the reports at Stockton which are not in evidence here, you did take that into consideration, did you not?

A. Well I don't know that I did. I didn't think about it but I have, of course, the statement——

Q. Interposing: Well, we will limit it them. You didn't really need to know anything about his boyhood history or army record in order to arrive at the conclusion you did other than what is testified to?

A. No.

Q. Therefore you had no personal knowledge whatsoever or knowledge derived from other doctors of the plaintiff prior to the year 1927?

A. We get——

(Testimony of Dr. Fred J. Conzelmann.)

The COURT: Interposing: The point is you, yourself, never made any of these observations prior to 1927; in other words, everything you have based your opinion upon as [62] to his conduct, as to what he did and said prior to that date has simply been that you accepted the statement of witnesses who went on the stand?

A. Yes.

Mr. HJELM: I want to get that. So that since 1927 there is no question, Doctor, but what he was non compos mentis?

A. Yes.

Q. But the only evidence that you have taken into consideration in arriving at your answer to the hypothetical question that in your opinion he was in 1919 permanently and totally disabled, the only evidence that you examined was what the mother testified to and what the friend, the lady friend testified to.

A. And there are what the doctors, the experts——

Q. Interposing: But those doctors are all after 1927, were they not, after 1927?

A. Yes. Well, those——

Q. Interposing: Therefore all you had in addition to that which has transpired since say the first of the year, 1927, was the testimony of the mother and the lady friend?

A. Yes.

Q. And you then as an expert, you considered that the testimony of the lady friend who told about

(Testimony of Dr. Fred J. Conzelmann.)

how he appeared and acted to them, and what the mother testified as to how he acted was sufficient to connect up the patient's condition with dementia praecox?

A. Yes.

Q. With that of 1919?

A. Yes.

Q. And to the extent that you believed he then was wholly disabled?

A. Yes. [63]

Q. (By Mr. HJELM). Well, I will put it—I didn't know that he would object and I thought I would go as far as I could. Now, Doctor, you are not of the present opinion, are you, that the plaintiff here could not do any physical work in 1919, are you?

A. No. He can do physical work now.

Q. Did you know him, did you know that he was a railroad fireman in 1921 and '22.

A. That is what they testified to.

Q. Did you think he was wholly disabled then, at that time?

A. I think so, yes, according to——

Q. Interposing: How do you differentiate that between—Assuming I have gallstones now and that I am working.

A. Yes.

Q. Trying to. Assume that the Mayo doctors diagnosed me as a gallstone patient——

Mr. GERLACK: Interposing: I submit that is argumentative and not proper cross-examination.

(Testimony of Dr. Fred J. Conzelmann.)

Mr. HJELM: No. I am trying to bring out something. Assume a subject, a certain person has gallstones for which he should have an operation, and if he doesn't that he will die. Will you say he is wholly disabled?

A. Well, in the sense as I understand this disability, it means he can't continuously work.

Q. In other words, that is a parallel case?

A. That he would be totally disabled.

Q. That is a parallel case, Doctor. I wonder if I could by telling you I have gallstones cause you to change your opinion.

A. Well, if you had gallstones and you did work and you get out but you can't continue to work and have a gainful occupation.

My thought is that from the time he left the army [64] he should have been placed in some place where he wasn't employed. Making the effort and the stress and strain of life, of course, has caused him to break. In my opinion dementia praecox is not congenital, although there may be a predisposition to it that can be brought about by some event. Taking the definition of permanent and total disability as any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, I would say that he was totally disabled in 1919. I believe he was because he could not continuously continue. I feel that he should have been in a hospital at that time. I think this because from the evidence that one of the witnesses said, he was

(Testimony of Dr. Fred J. Conzelmann.)

odd and queer and wouldn't talk. I wouldn't hospitalize every man who was odd and queer. Probably every one of us has some odd idea but it depends on the setting and what occurs. The fact that a person works or does something doesn't mean he is not sick. It is a fact that the degree with which dementia praecox accelerates or grows is different in various subjects and is also different under various circumstances. In this case the evidence was in 1919, soon after he came out of service, he acted queer and odd.

Q. Haven't you, Doctor, in your experience as a doctor had many, numerous occasions, experiences where you have seen patients acting just as that young lady said he acted and notwithstanding that your observation of that subject over the years would be that he didn't develop into an active dementia praecox?

A. Well, I wouldn't say it was active but it was so that it didn't interfere with his work. If he continued it was to the detriment of his own personality because he had——

Q. Interposing: You later observed he could work, that he [65] could do some work?

A. Oh, yes, they all can.

Redirect Examination

A change of personality is this, a person becomes, or he is considered odd or queer or a little different and they are indifferent, apathetic and even, of

(Testimony of Dr. Fred J. Conzelmann.)

course, those ideas of constantly trying to make good and a mental disease definitely recognizes itself. Very often they over rate their ability.

Q. I will ask you this, Doctor, are you able to make a diagnosis of dementia praecox in this case from the symptoms that were manifested in 1919 with the mask-line expression and the pain and headaches is back of the head, back of the brain, back of the head and drowsiness?

A. I consider that symptoms of dementia praecox.

The disease of sleeping sickness or encephalitis lethargica may have such symptoms in support, and an infection like that could be the exciting cause of dementia praecox. There are a great many people who have dementia praecox that we are coming in contact with every day of our lives but it is not very often evident that it is discernible and they are being treated. My point is that dementia praecox is a type of disease that if you work will quicken it and once having made its manifestation it should be treated, and even though they can do things, slightly different lines of work, they should not be allowed to do them. They should be segregated. I have seen cases in the asylum where people have come in and undergone treatment and got back and gone out of the asylum and met the outside work and then they came in contact and got nervous and came back into the asylum. They get better in the asylum than they do in the outside

(Testimony of Dr. Fred J. Conzelmann.)

world, rest [66] and quiet and shelter from the storms of life and treatment is the only way of effecting a cure.

Recross Examination

Q. (Mr. Hjelm) Now, Doctor, one more question. Could you form presently an opinion as to whether or not the dementia praecox became active when he was in the army?

A. Well, of course, he thought—well, according to the sergeant's report there up until he was sick, under the stress and strain he seemed to be happy and contented and worked all right and did his work until this more serious infection, whether it was flu or encephalitis, it was a serious infection and after that the change of personality came on.

Q. Could you now give a diagnosis as to whether or not he had dementia praecox at the time that he was discharged?

A. No. That is because—that is just from the symptoms of what some other witness said who brought him home, that he looked this way.

Q. Therefore you really base your opinion upon the testimony of the young lady about his conduct?

A. Yes.

Q. The way he was looking?

A. Yes.

Redirect Examination

Q. Do you believe in this particular case his whole trouble was caused by the war, his war experiences?

(Testimony of Dr. Fred J. Conzelmann.)

A. Well, I wouldn't say war experiences. I think the illness that he had.

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TESTIMONY OF DR. EDWIN M. WILDER,

a witness called on behalf of plaintiff, after first being sworn, testified as follows: [67]

I am a licensed physician and surgeon, a graduate of the University of California Medical School in the year 1900. I have practiced continuously since that time. I have been connected with the French Hospital in San Francisco and the Napa State Hospital. I have been one of the examiners of insane people for commitment and I have been qualified as an expert in the diagnosis both in the Federal and local courts, county courts. I have testified in Federal courts. I have testified in eight or ten of the superior courts. I was appointed a member of the Lunacy Commission of Sacramento County in 1905 and I guess I still am a member. I have been in the courtroom and heard all the testimony in this case. I have had considerable experience in the diagnosis of cases of mental disease. I don't treat it. I simply diagnose it. I have heard all the testimony in this case and I feel that I am in a position to state whether at the present time this particular patient is insane or not. I also feel that I have sufficient data in my possession, assuming the facts to be true, to trace back during what period the in-

(Testimony of Dr. Edwin M. Wilder.)

sanity existed. Assuming the facts which I have heard to be true, I think the present diagnosis is dementia praecox, paranoid type. Dementia praecox is a mental disease of early, generally of early adult life, from fifteen to forty-five. We call it dementia praecox to distinguish it from the dementia or lack of mind of the old people, senile dementia, which is a totally different thing. Its origin is somewhat in dispute among students of the thing. It is characterized by many varying symptoms but primarily by and especially by the changing personality and failure of victims to realize the circumstances under which they find themselves and the importance or the severity of the situation. There is a progressive mental deterioration which is frequently followed [68] by remission where he doesn't get any worse. I don't think they ever get any better. They sometimes stop and run along a while and then have another period of descent mentally. They sometimes have muscular peculiarities and they frequently are subject to hallucinations of sight, hearing and delusions. Delusions are generally fixed in character. That is the same type of delusion, same story goes along in their minds. A delusion is a conclusion arrived at through faulty interpretation of either real or false data which can't be corrected by the patient by the use of his own mind. Sometimes it is that somebody has it in for him. A man in normal mind,

(Testimony of Dr. Edwin M. Wilder.)

you can talk with him, you can reason with him and explain to him.

Q. If those facts that have been testified to are true, when, in your opinion, did dementia praecox in the case of Arthur J. Eide begin?

A. In the late fall of 1918 or spring of 1919.

Q. When would you say from those facts was the incipient stage?

A. Probably from the time of the severe infection of whatever character it was, also probably in camp until the first testimony that we have as to change in personality.

Q. (By the Court) When would you fix the beginning, the actual beginning of the illness that he had, positive manifestations of dementia praecox?

A. I think that—we have testimony as to his normalcy prior to the illness. We have testimony of the severeness of the illness. We have the testimony of the Sergeant as to the severity of the illness and we have the testimony of, as to the changed personality at the time of his arrival at San Francisco. Now, between the inception of the infection, which, to my mind, was probably the provoking cause—— [69]

The COURT: Interposing: You think, in other words, prior to his discharge, prior to his discharge he had shown the presence of dementia praecox?

A. I am not prepared to say as to that. He had shown the presence, through the sergeant's testimony, of a very severe infection, practically putting

(Testimony of Dr. Edwin M. Wilder.)

him out of business, but I don't think we have any, as I recall it, I don't recall—it was only an affidavit and read and I didn't get it as well as I did from the men testifying directly, Mr. Romaine's testimony as to his character when he came back to the office immediately after his discharge is the point that I definitely recognize a change of personality.

The COURT: In other words, you recognize then what appeared to be manifestations of dementia praecox?

A. In the light of the further developments, yes.

I would say that at the time Mrs. Martin saw him in the office in February or March of 1919 he was suffering from some type of dementia. Whether it was a result of the early dementia praecox or the result of encephalitis at this date I am not prepared to say. He may have had them both. We have testimony all through of some symptoms of both. The disease that is generally indicated by the name of encephalitis lethargica, is an acute infectious disease of the brain itself and the central nervous system and the spinal cord. In our vast medical history there no doubt were previous epidemics of it as there were with the flu, not identified at the time. They didn't know enough about it. Looking back, as I say, we have epidemics which we believed were encephaltis. The first case that showed up comes as the lethargic type, the dull sleepy type, and we hooked that name on to it of encephalitis lethargica as opposed to the inflammation of the brain but we

(Testimony of Dr. Edwin M. Wilder.)

know now that a good many of the cases, although not this one, at that time vary in the symptoms accord- [70] ing, first, to the severity of the infection, and second, according to the part of the brain and cords, central nervous system that the minute areas of infection strikes and even after absence may become acute again. It starts in first a good deal like the flu, headaches and considerable fever. The headaches are pretty generally across the entire contents of the skull. During the period described by Sergeant Barrett and the witnesses who saw him when he first came back, he had a very severe infection of some kind. We haven't any medical observation of his army—at the time he was in the army. We have to reason from the observations afterwards when he was partially recovered. I, frankly, don't know. He had one or the other or both.

Q. Well, I will read you this definition, Doctor. This is our exhibit. The definition of total and permanent disability is "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed to be total disability. Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it." Bearing in mind that definition, Doctor, have you an opinion as to whether or not Arthur J. Eide was totally and permanently disabled within this definition prior to July first, 1919?

(Testimony of Dr. Edwin M. Wilder.)

A. I think he was, yes.

Q. You have an opinion. What is your opinion?

A. I say I think he was.

My view is not that he could not muscularly do certain things but that the disease was a continuing thing and that if the matter has not been gone into with known types of treatment—very much like tuberculosis, a fellow [71] with tuberculosis. He is totally disabled. If he goes out and chops wood, he could chop wood for a while but he is just gas much totally disabled in view of the fact he could not do it—. I believe from the time that dementia praecox made its manifestations and no matter how far it has progressed, as soon as you can recognize it as dementia praecox, that a man is totally and permanently disabled from then on. Dementia praecox isn't revealed by the nature of the disease even in the early stages. There is a certain point where he always breaks down. He always loses his job. He hasn't good reasoning capacity. He works only under directions. You can take a man not far gone in dementia praecox and if he is not violent with an attendant standing alongside, he will hoe weeds but he may hoe the tops off the flowers at the same time.

The COURT: That is when it has reached a certain point. Of course, if you establish that he has reached that point where he will do that,—but what I am speaking of is this: Isn't there an early stage from the time it makes its manifestations that the man is able to seek and hold employment and to make a livelihood out of it?

(Testimony of Dr. Edwin M. Wilder.)

A. They don't make a livelihood, Judge.

The COURT: You don't believe this man could make a livelihood?

A. No.

As soon as it makes its manifestations he is totally disabled. He is just as much dementia praecox as he ever will be later. Just like a typhoid; the first week he may walk around and do his work. Well, he is just killing himself and he is just as much disabled then as he will be at the time when he drops. I believe that Mr. Eide showed all the symptoms of dementia praecox prior to July 1st, 1919, [72] and it was reasonably certain at that time that he would carry this disease throughout his lifetime. I don't think dementia praecoxes recover. In the earlier stages of dementia praecox there is no question but that, the first few manifestations of the praecox, the quiet, the rest, are the most essential things in bringing the case to a condition of suspension. If you catch a case and rest it a great deal, you have a reasonable amount of expectancy of getting it to remit at a relative high grade but in these later cases where they are definitely a dementia praecox it is unfortunate that we have occasional periods of irritation or over wear and tear that result in——

The COURT: Interposing: Do you mean the progress of the disease?

WITNESS: The same amount of disturbance earlier will result in nothing more than modifying the degree while if you give it the same amount

(Testimony of Dr. Edwin M. Wilder.)

later you may kick up a certain amount of violence that will require sequestration and all that but at the same time you don't have any effect upon the termination of it.

I think the only hope of treating the disease successfully is to keep him at rest, to keep him from being up against the stress and storms of life.

Cross Examination

If I had observed the things that the young lady in the insurance office said she saw, I don't think I would have said to myself, there is a case of dementia praecox. I think that I could probably from a limited amount of observation then have determined that he was mentally depressed. Very frequently you can't tell when a case of dementia praecox has developed unless you have the preliminary information and later information. You have only one section of the dementia praecox from her answers. The diagnosis of dementia praecox [73] is so dependent upon the issue of character that while you can observe a set of obviously—set of sometimes obvious——

The COURT: Interposing: In other words, Doctor, you have to have sufficient results of observations upon which to predicate a definite opinion.

A. Yes. I know he is depressed but I can't tell what kind of depression.

The COURT: I will allow the question in that form. Assuming you had no history prior to his discharge—Suppose the first data you get is after he has been discharged, would you trace back his inca-

pacity of dementia praecox to the time that this young lady testified she saw him acting as he did?

A. If I may qualify I will say no.

The COURT: Proceed. That is the question.

Mr. HJELM: Your answer was no? Was your answer no?

WITNESS: There is nothing at that date, in the absence of all other subsequent and preceding information, to justify a diagnosis of dementia praecox merely by mental depression. I can't go into a differentiation as to what it was. He was sick, no doubt about that. What kind of sickness I am not prepared to say without more information.

Q. When was he sick?

A. He was sick on the day of his misbehavior to the young lady.

Q. And that date, you arrived at the conclusion he was sick on that day because he appeared to be in a brown study and because he was shifty in his appearance and on that alone you would say he was sick?

A. Not that alone. I would say he wasn't in his normal mind.

Assuming that he had no severe infection as the result of influenza, my present opinion as to the question of his total disability in 1919 would not be different. Something [74] broke his mind down. Whether he had had any manifestations of any kind or significance prior to the date that he was in the young lady's office, that wouldn't have any bearing on the question. None whatever. I do not think that his behavior on the day in question with the

(Testimony of Dr. Edwin M. Wilder.)

young lady was sufficient for you to determine that it was dementia praecox.

I examined this man Thursday, the 22nd day of February, 1934. I know nothing of him prior to that time except the testimony which I have heard here.

Q. Wouldn't you say the doctor who had examined him at the time he left the army on January 25, 1919, who had personally observed him, made personal observations of him, would be in a better position to give some accurate helpful information than you who had not seen him until 1934?

A. If the man who examined them when they left made no more of an examination than I gave when I put them in the army, no.

Q. What?

A. I said if the man who examined him when he left the army gave no closer examination than the examinations that I did, that was personally made when the boys were put into the army in 1918, I would say no.

The COURT: The question is argumentative but there is no objection. I was referring to the question.

Mr. HJELM: Well, now, Doctor, you wish to leave this thought, that the doctors who examined the soldiers both when they went in and went they went out were careless in their examinations?

A. Not careless by intention. Simply overwhelmed by a mass of material.

(Testimony of Dr. Edwin M. Wilder.)

Q. Let's put it that way, that they didn't make careful examinations.

A. They could not.

I personally believe that dementia praecox is caused by a severe infection, severe physical damage. I believe [75] that it doesn't necessarily have to be prenatal. There are some cases where the body may not be predisposed to receive it, and a man with a strong healthy mind and body may acquire dementia praecox. My opinion is that it is the result of some force, strain thrown upon the physical character of the body reacting upon the brain which is after all purely physical. If the history of this man as far as we have in this case was known to me upon the day that he appeared at that office before that young lady, I had known his history and then observed the man doing the things he did, not knowing what is going to occur in the future at that time, I believe I could have said "this is a manifestation of dementia praecox." I would come mentally to the conclusion that he had dementia praecox. On limiting any answer to what occurred in the office that day I could not say that he had dementia praecox. If at that time I knew all the facts up to that day and I observed him there in the office and heard his conversation I would say he should have been hospitalized, and even before this time he should not have sought employment.

Physical exercise is not in itself dangerous and is a necessary part of the treatment of the praecox. It is the shocks from contact with the world that do the damage.

(Testimony of Dr. Edwin M. Wilder.)

Q. So physical exercise, as I understand, Doctor, physical exercise in and of itself is not bad for him; in fact that is something you give them to help them. In other words, being occupied with something that ought to be done on a car or a train, that amount of thinking that would be required to do that, you don't think that that would be a strain, would hurry on the dementia praecox?

A. I do. I think working on a train, a train man and all the incidentals of train work are not conducive to the type or kind of rest, or any of the things that would help his recovery. Then the contacts, the responsibility in determining [76] just when to make a flying switch, let them out, throw over a lever when the thing is within twenty feet or twenty-five feet, that is quite a problem. Baseball is a good thing and it is educational for this reason, that he is working in a definite coordinated healthful surroundings. The other boys I am not speaking of professional baseball, but baseball like the teams at Stockton, let us say, where they can't scrap. He is doing a muscular thing according to a definite rule and is very much better for him than working in the garage.

Redirect Examination

Q. In this particular case Mr. Hjelm has picked out various detailed instances of conduct by Mr. Eide and asked you to venture an opinion. What we are interested in is the whole picture, taking the whole picture clear back to the beginning when he

(Testimony of Dr. Edwin M. Wilder.)

was affable, agreeable, sociable, dependable, neat in appearance, and an ambitious young man before the war, he suffered the infection in the fall of 1919, followed by a complete personality change whereas afterward he presented a picture of undependableness, unsociability, mask-life expression, unreliability, bearing in mind all those things in the man, have you any question in your mind at all that he had dementia praecox and was permanently and totally disabled in the spring of 1919, prior to July 1, 1919?

A. I have no doubt. I have said so.

Q. Do you make railroad examinations yourself?

A. I have not for many years, but I have done so in the past.

Recross Examination

At the present time I am practicing here in Sacramento and I am not connected with the government or the state. I was at Napa in 1902 or 1903 and served for three years. [77] I never saw Mr. Eide until Thursday of last week, when I examined him at the request of Mr. Gerlack.

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MRS. BERTHA K. EIDE

(Recalled on behalf of plaintiff).

By Mr. GERLACK: Mrs. Eide, do you know of your own knowledge why Arthur didn't pay any

(Testimony of Mrs. Bertha K. Eide.)

premiums on his insurance after July 1 or June 1, 1919?

A. Well, he didn't work. He went from place to place and there wasn't enough, you know, to keep the house going and and keep me going, he wasn't able to.

Q. Now, the other question I want to ask you is this: You put in a claim in this case in 1929. Why didn't you put in that claim before?

A. Well, I didn't know if we had any right to it but someone told me down in Palo Alto that I should put in a claim.

Q. Just as soon as you learned you had a right under the policy, you put in a claim?

A. Yes.

Mr. GERLACK: That is all.

Mr. HJELM: Oh, that is all.

Mr. GERLACK: That is the plaintiff's case.

Mr. LYNCH: At this time we would like to make the customary motion for non-suit on the ground that there is no evidence before the court to show the disability on the date alleged.

The COURT: The motion will be denied.

(The records of the Adjutant General's Office relating to Arthur J. Eide received in evidence and marked "Defendant's Exhibit #1" and is incorporated herein by reference the same as if it were fully set forth in words and figures). [78]

## DEPOSITION OF HENRY BOGEL.

The deposition of Henry Bogel, a witness on behalf of the defendant, was read in evidence and the same reads as follows:

I reside at 1427 43rd Avenue, San Francisco, California, and I know Arthur J. Eide. In 1920 I was employed by Levinson Bros. as a car washer. They were in the business of storing and washing cars. During 1920 Arthur J. Eide worked there. He was a floorman there for about six months. He waited on the gas trade. He sold gasoline and oil. He worked from eight in the morning until six at night. I saw him every day and could see him doing his work. He waited on the customers and sometimes when a party drove in the doorway, he backed the car in a stall. At that time his physical appearance was very good, he was healthy, strong, he was all right. We talked together sometimes when there was nothing to do. He appeared to converse in a coherent and connected manner. He left Levinson Bros. sometime in 1920. He was going to start a garage up on Divisadero Street. I saw him once after that. A couple of years later he came down to see me and wanted me to go into partnership with him. I told him I wouldn't go into partnership with him because you couldn't make any money in his proposition, there were four men in it. That is all I said. His appearance at that time was about the same as before. He was all right. There was nothing wrong with him that I saw. I found him all right. I saw him after that when he was running around with a

(Deposition of Henry Bogel.)

little Ford truck with a box on it. He was going around from house to house trying to see if he could get anybody's car to grease. He was around once in our place on Natoma Street. At that time he showed me a lubrication machine. He said he figured to have a couple of those machines, but I told him there was no money in it. He showed [79] the machine to me and explained its operation to me. He figured to get $1.50 a car.

(Cross-examination waived).

Redirect Examination

It was in 1920 that Mr. Eide worked for Levinson Brothers. At that time he was 5′7″ tall, heavy set, and had blonde hair.

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TESTIMONY OF JOHN A. SILVA,

a witness called on behalf of defendant, after first being sworn, testified as follows:

I am head timekeeper of the Southern Pacific Company and have been such for twelve years. I have with me the personal records of Arthur J. Eide and an abstract of his earnings with the Southern Pacific Company. I am sufficiently acquainted with the records of the Southern Pacific Company to positively state that these are the original records. They show the period of time that Mr. Eide worked for the Southern Pacific Company. He com-

(Testimony of John A. Silva.)

menced work in June, 1920. He worked as a machinist's helper at Dunsmuir, June, July, August, and as fireman in September, down to October, 1921. He first went to work in June 1920 and was discharged for the first time in January, 1921. He was off until May, 1921, was reemployed in May, 1921, and worked until October, 1921. He was reemployed January 1922 and worked until April, 1922.

The employees of the Southern Pacific Company at that time were paid every fifteen days. The last half of June, 1920, Mr. Eide earned $62.30; the first period in July, which is July 1st to July 15th, $2.69; the second period in July, which is July 16th to the last day of the month, $34.90; from August 1st, to August 15th, $81.84. From August 16th to the last of the month he earned $14.73. From September 1st to September 15th he earned $140.84. From [80] September 16 to the last of the month he earned $149.83. From October 1st to October 15th he earned $172.34. From October 16th to the last of the month he earned $139.64. From November 1st to November 15th, $67.59. From November 16th to November 30, $181.84. From December 1st to December 15th, $83.64. From December 16th to December 31st, $130.52. From January, 1921, from the 1st to the 15th, $76.24. From the 16th of January to the 31st, $25.85. From May 16th to 31st, $24.03. From June 1st to the 15th, 1921, $147.48. From June 16th to June 30th, $121.50. From July 1st to July 15th, $24.78. From July 16th to July

(Testimony of John A. Silva.)

31st, $28.07. From August 1 to August 15, $117.20. From August 16th to the 31st, $64.16. From September 1st to September 15th, $59.56. From September 16th to 30th, $51.99. From October 1st to 15th, $36.00. From January 1st to January 15th, 1922, $46.80. From January 16th to 31st, $65.52. From February 1st to the 15th, $60.84. From February 16th to the last of the month, $46.80. From March 1st to March 15th, $60.84. From March 16th to March 31st, $65.52. From April 1st to April 15th, $9.30.

Mr. Eide was working for the Southern Pacific Company up at Dunsmuir up to October, 1920; from June, 1920, to October, 1921, and at Bayshore from January, 1922 to April, 1922. The men worked according to seniority, that is, the greater the number of years that you have with the company, the better opportunity you have to work. For instance, a fireman on the extra line, why the greater number of years he has, why he has preference for better runs or to work continuously. In this case it shows he was cut off the working list at certain periods. That means when there isn't enough work the younger men are cut off the working list. They are not permitted to work until the organization and the company permit them to come back. The records show that Eide was [81] cut off because there wasn't work. If he were laid off because of illness it would not show on the record.

(Two applications for employment received in evidence and marked "Defendant's 2-A and 2-B").

TESTIMONY OF FRED W. GREENMAN,

a witness called on behalf of the defendant, after first being sworn, testified as follows:

I am a timekeeper for the Southern Pacific Railroad and have been employed by that company for twenty years. I know Arthur J. Eide and became acquainted with him I think in 1920, when he first came to Dunsmuir. I was there before he arrived. I would see Mr. Eide practically every day while he was working there. I wouldn't say every day but I saw him about as often as I saw anybody in the same department he worked in. I was around the shop quite often and I would be seeing him on the street occasionally, practically every day, because it was a small town and going to and from work I would see him quite often. I was very well acquainted with him because he came up there to play baseball and I was a baseball fan and went to all the games and talked with him quite often. I knew him all the time he was in Dunsmuir. I observed him playing baseball up there. I think I saw practically every game that was played in Dunsmuir. He played on Sundays only and I saw practically every game he played in town and probably the games in the neighboring towns. They played probably every other Sunday, sometimes two or three Sundays straight and then a couple of Sundays out of town. I also attended a few of the practices of the baseball team. I observed Mr. Eide practicing and throwing baseballs on all those occasions. He

(Testimony of Fred W. Greenman.)

was a catcher. I considered Mr. Eide a good baseball player. As far as I [82] know I don't recall of him ever being taken out of a game. He appeared to be happy and well pleased with himself when he was playing baseball. He had the appearance of being in good health in every way. I never noticed anything unusual about him at all.

Cross Examination

I knew Mr. Eide from June 1920, until he left there, the winter, I think, of January, 1921. He came back in May, 1921, I knew him until that fall. I am not testifying from the records but I knew him as well as I would know anybody else who worked for the company around Dunsmuir. He quit there the first time—he was cut off the board in the slack season of the year. They always cut off. They take them off the board because not enough work. They run in seniority order and the men with very little seniority during the slack season are as a rule cut off the board. I don't know of my own personal knowledge whether he was taken off the board for being sick. During the time he was up there I never noticed that he seemed to have a fixed expression on his face.

Q. Did he ever complain to you about having headaches?

A. No.

Q. Did he ever appear to you to be nervous?

A. No.

(Testimony of Fred W. Greenman.)

Q. Would you say during that time that he was not nervous?

A. As far as I know, he was not.

Q. Would you say that during that time he didn't have headaches?

A. No, sir.

Redirect Examination

The baseball team was in a small town league. They weren't incorporated into a league but supposed to be regular games. It was to an extent professional. I can't [83] say that Mr. Eide was paid. I know that he was supposed to be paid, and they were on salary—he was a salary player although I never saw him paid any money.

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TESTIMONY OF KENNETH H. HORNER,

a witness called on behalf of the defendant, after first being sworn, testified as follows:

I am a civil engineer employed by the Southern Pacific Company. I was employed by the same company at Dunsmuir, California. I observed Arthur J. Eide at that time quite often. I would see him on Sundays when we had our Sunday baseball games and through the contact of a small town. I also had occasion to be quite often in the shop doing certain observations and mechanical work and I had occasion in that way to contact him, not personally, but to see him. I am quite a baseball fan and I saw him playing baseball quite often. I would say that he

(Testimony of Kenneth H. Horner.)

was a very good baseball player. I was not personally acquainted with Mr. Eide but if he was here in this courtroom I could identify him. During 1920 and 1921 I never noticed anything about him with regard to his mental or physical condition out of the ordinary.

Cross Examination

I never talked to Mr. Eide. I would see him on the street and knew who he was. I never observed anything about him that was not in my opinion normal.

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TESTIMONY OF LYLE A WELLS,

a witness called on behalf of the defendant, after first being sworn, testified as follows:

I am employed by the Pacific Fruit Express Company. In 1920 I was in Dunsmuir. I worked in a pool-hall and played baseball. I went there about June 6 or 7, 1920 I was [84] pitching there on Sundays at that time. I knew Arthur J. Eide and became first acquainted with him in the latter part of June, 1920. He was catching for the club and I was pitching. We were all being paid. It was either $10.00 or $15.00 a Sunday. We played every Sunday. We practiced two or three nights a week in the evening. Mr. Eide participated in these practices. Mr. Eide was the catcher. Since that time I have played professional baseball and in my opinion Mr. Eide was a very good baseball player. At that time I thought he was one of the smartest catchers I had

(Testimony of Lyle A. Wells.)

thrown to. I did not ever notice anything unusual about his physical or mental makeup. In addition to playing baseball with Mr. Eide, we roomed together about two months or a little better in the fall of 1920, up to the time I was married on February 2, 1921. We roomed in the same room. I seen him most every night except when he was out on his run while he was a fireman. I never noticed anything in all that time unusual about Mr. Eide in regard to his physical or mental makeup. I never heard him complain about anything.

Q. Just how did Mr. Eide act in comparison with a normal person?

A. I didn't see any difference. He was just a happy-go-lucky kid.

Q. At that time he was playing baseball do you know if he was employed?

A. Well, yes. He first went to work as a machinist helper in the shop and later when he went on the road as a fireman.

Q. He was playing baseball during that time?

A. Yes.

Cross Examination

I was friendly with Mr. Eide and I know where he is at the present time. He never complained to me about any- [85] thing. I wouldn't call him a nervous man.

TESTIMONY OF DR. EDWIN J. CORNISH,

a witness called on behalf of the defendant, after being first sworn, testified as follows:

I am a physician and surgeon and have been licensed to practice in the State of California since 1904. I am a graduate of the Rush Medical School in Chicago. I recall the plaintiff in this case, Arthur J. Eide. I examined him in November, 1920, when he applied for employment with the Southern Pacific Company as a locomotive fireman. At that time I made a physical examination of the applicant for any defects and questions that were asked the applicant and answers given. He passed the examination that was required physically. I gave him a rating of first class, which is distinguished from two other ratings, which are, rejected, and defects noted. The examination took about fifteen minutes and I had occasion to observe the conduct and observe his various reactions while I was examining him. I didn't notice anything unusual in either his physical or mental makeup at that time.

Cross Examination

Q. (By Mr. Gerlack) Doctor, did you give him any mental examination whatsoever?

A. Other than just observation.

I gave him the Romberg test and he was normal. I did not give him the Babinsky test. The Romberg test is made with the patient standing with his eyes closed to see the position that they take. The examination was made at the request of the superintendent of the Shasta Division. I don't claim to have

(Testimony of Dr. Edwin J. Cornish.)

made a mental examination, that is, not any general mental. It is more of a physical examination. [86] There is another part of the test which includes an examination for any physical defect, an examination of the heart, the lungs and the abdomen.

Q. As part of your routine you don't purport to make a mental examination?

A. Well, just from the observations and a question is asked the applicant if he has ever had any nervous disease.

Q. Do you recall in this particular case, Doctor, whether or not he had a fixed stare or fixed expression on his face?

A. I don't recall any such condition.

Q. You don't recall this man at all, do you?

A. Yes.

Q. You do. Just describe him then.

A. Well I recall him as a baseball player. I have seen him playing baseball, a rather short, heavyset man.

Q. Mental patients can play baseball, can they not?

A. Yes, if they can.

Q. Yes. Mental patients are capable of playing baseball, are they not, although they are badly affected mentally?

A. I think it would be possible for them, yes.

Q. As a matter of fact at the State hospitals, Napa and also Stockton, you go up there on Sunday afternoon and you will see baseball games in opera-

(Testimony of Dr. Edwin J. Cornish.)

tion where they have mixed teams of patients and attendants and sometimes doctors, isn't that true?

A. It might be, yes, part of the treatment for them.

Redirect Examination

If this man had had a fixed stare on his face, I think I would have noticed it. I did not notice any such stare. If he was given to turning his head from side to side and had a pasty expression on his face, I think I would have noticed that, but I did not see any such signs. [87]

Q. Was there anything in any of the actions of this man or any of the findings which you made which would indicate to you that there was anything abnormal about him mentally or physically?

A. I didn't note any.

Recross Examination

I examined Mr. Eide just this one time. I saw him playing baseball when he was in Dunsmuir two seasons. Probably I saw him three or four times each season. [88]

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TESTIMONY OF DR. PATRICK. J. MANGAN,

a witness called on behalf of the defendant, after being first sworn, testified as follows:

I am a physician and surgeon licensed to practice in the State of California. I have been practicing for thirty-six years. I am a graduate of Cooper Medical College in San Francisco. That is now the medical department of Stanford University. I be-

(Testimony of Dr. Patrick J. Mangan.)

long to the San Francisco County Medical Association and am now connected with the Southern Pacific Company. I was connected with the Southern Pacific in 1920, 1921 and 1922. The handwriting on the third page of Government's Exhibit 2-A is a photograph of my handwriting. The document referred to refreshes my mind that I made an examination of this man. I don't recall the exact instance other than what this discloses. It discloses that I made an examination on January 9, 1922. It was a physical test examination for employment as a stenographer for the Southern Pacific. It was an examination of the vision and hearing, heart, lungs and genital organs and examination for any deformities and general mental makeup. I have classified him here as first-class.

Q. At the time you made the examination, Doctor, did you make any record of any appearance of any abnormality in this man's mental or physical makeup?

A. It is not recorded.

Q. If there had been any such abnormality would you have made a note of it?

A. I believe I would.

Cross Examination

I have no recollection of this man and if it weren't for my signature on the exhibit I could not say that I ever heard of him. The examination took probably fifteen or twenty [89] minutes. I did not make a mental examination other than noting the character-

(Testimony of Dr. Patrick J. Mangan.)

istics as to whether he was quick or slow. I did not make the Romberg test or the Babinsky test but made general observation coming into the room and going out.

Q. Well you are not able to say that he might not have been affected with a mental affliction at that time?

A. Why certainly not.

Q. If he had been in a period of remission from some mental trouble you could have examined him physically and found nothing wrong but that wouldn't have affected the fact that he might have been affected mentally?

A. The only way I could judge a man's mental state would be to judge what he said and his answers and there was nothing said or nothing done on that occasion to cause me to note anything of a mental defect.

I have not had extensive experience with mental patients, any more than any other type of patients.

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TESTIMONY OF HELEN KAFFER,

a witness called on behalf of the defendant, after first being sworn, testified as follows:

From July 1918 to June 1919 I was employed by the Southern Pacific Railroad Company as a clerk. My particular duties were that I made out all the passes and handled all the personal records, the filing and filling out of all personal records. I recall the

(Testimony of Helen Kaffer.)

plaintiff in this case, Arthur J. Eide. He filled out an application and I witnessed his signature and asked a few questions. I said "Is your hearing good?" and he said "Yes" and "Is your eyesight good?" He said "Yes". I asked him what education he had had. He said he had had an eighth grade education. If he didn't answer all the questions on the application I would ask him to answer "Yes" or "No" in that instance. I recall the plaintiff but it would be hard to say how often I saw him because [90] I was working in the office and he was in the machine shop and was firing on the road, and possibly when he would come in the office I would see him or when he was going to and from work. When he was working in the shop I would say I saw him once a day, maybe twice a day. I did not carry on any conversation with him, but I met him there on the job when he applied and filled out his application and I saw him to say "Hello" or pass the time of day.

Referring to Government's Exhibit 2-B, I recognize the photostated handwriting as that of Arthur J. Eide.

Q. Did you in all the time you knew Mr. Eide observe anything unusual about him mentally or physically?

A. I did not.

Cross Examination

I did not know Mr. Eide intimately enough to know whether or not it was true that he might have been a little off mentally.

(Testimony of Helen Kaffer.)

Redirect Examination

Mr. LYNCH: At this time I would like to read from Government's Exhibits 2A and 2B.

The COURT: Proceed.

Mr. LYNCH: Referring to question No. 7: "Give complete record of your services for last five years, giving each year in regular order down to date. State what railroad experience, if any, you have had, giving names of roads, in what capacity employed and length of service on each road. If you have not previously been employed by a railroad company, state by whom, when, where and how employed. Name of railroad or other employer. J. B. F. Davis & Son, San Francisco, California, 240 Sansome Street. Placing fire insurance from 11/28/12 to 6/30/17. U. S. Army, Balloonist, 7/23/17 to 1/29/19. U. S. Housing Corporation, Vallejo, [91] California. Vallejo California, Clerk. From 4/1/19 to 6/1/19. Merchants Garage, San Francisco, California. 35 Natoma Street, Mechanic from 9/1/19 to 4/1/20. Yreka Baseball Team, Yreka, California, Yreka, California. Ball player from 4/15/20 to 6/15/20. S. P. Company, Dunsmuir, California, Dunsmuir, California. Machinist Helper from 6/15/20 to 8/28/20. June 1, 1919 to September 1, 1919. Question 8. Have you ever been injured? No. If so, how often, when and at what place?

"How did injury or injuries occur?

"Extent of injuries?

"Do you use intoxicating liquors? No.

* * *

(Testimony of Helen Kaffer.)

"If employed at present, by whom? Answer: Southern Pacific Company. * * * Town or City, Dunsmuir, State of California.

"In what capacity are you employed? Locomotive Fireman.

"If not employed at present why did you leave your last place? To better myself." Now, this is Government's Exhibit 2A: "Give complete record of your services for last five years, giving each year in regular order down to date. State what railroad experience, if any, you have had, giving names of roads, in what capacity employed and length of service on each road. If you have not previously been employed by a railroad company, state by whom, when, where and how employed.

"J. B. F. Davis & Son, San Francisco, California. 240 Sansome Street. Clerk. 1912 to 1917.

"U. S. Army 1917 to January, 1919.

"U. S. Housing Corporation, Vallejo, California. Vallejo, California. Stenographer. February, 1919 to May, 1919. [92]

"Sierra Auto Company, Reno, Nevada. Reno, Nevada. Stenographer and bookkeeper from May, 1919 to December, 1919.

"Merchants Garage, San Francisco, California. 35 Natoma Street, clerk from January, 1920 to June, 1920.

"U. S. Immigration Station, Angel Island, California. Stenographer from February, 1921, to May, 1921.

(Testimony of Helen Kaffer.)

"Southern Pacific Company, Dunsmuir, California. Fireman, June, 1920, to February, 1921, and June, 1921 to October 1921.

"Question 11: If not employed at present time why did you leave your last place? Business slow—cut off."

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TESTIMONY OF DR. ELMER L. CROUCH,

a witness called on behalf of the defendant, after first being sworn, testified as follows:

I am a physician, a graduate of the Missouri Medical College, now Washington University of St. Louis, Missouri. I am a member of the Illinois State Medical Society and American Medical Association and Neurological Society. I have been with the Veterans' Administration since 1921 and have specialized in nervous and mental diseases since 1897. I have been examiner for mental and nervous diseases in the diagnostic center at the Veterans' Administration Hospital at Palo Alto since January, 1928. The cases that come before me at the diagnostic center are problem cases that are sent to the diagnostic center from the district offices in the western part of the United States extending from about Denver, Colorado, and El Paso, Texas, to the Pacific coast. My examinations have been to determine the nervous and mental diseases of the claimant.

I examined Arthur J. Eide in November 1927 at the Veterans Hospital at Palo Alto upon his admission to that [93] institution. I have in my hand

(Testimony of Dr. Elmer L. Crouch.)

a copy of the examination report made by me at that time. That was the first time I examined him. I first took a history. He was asked information regarding his family and his personal history, his military history and his post-war history and his history after his discharge from the service. Then he was asked what his symptoms were, what his complaints were, and the complaints given were recorded. Then I made a physical examination, a neurological examination and a mental examination.

The family history—I may state that in addition to the information obtained from him there was a social service report that was supposed to have been made by the mother and part of the family history was quoted from that social service report.

The father was John P. Eide, a native of Norway, living and aged sixty-three, good health. Mother, Bertha K. Kibstad, a native of Norway, living, age sixty, good health. One brother and two sisters, living and good health. There were two still births and one child died seven days old. Denies knowledge of nervous or mental diseases in family. That history was obtained from the social service report. That was then in the file and in parenthesis is quoted, or a note "Obtained from patient's mother."

Personal history: "Born in Tacoma, Washington, January 20, 1893, fourth of seven children born. Was considered a normal baby and child; very fat and plump. Walked at fourteen months. Talked at average age. Was very quick to learn. Not consid-

(Testimony of Dr. Elmer L. Crouch.)
ered a nervous child. Had measles, mumps, chicken-pox and whooping cough when a child; in about 1917 had an operation on nose at Lane Hospital. Started to public school at about six years of age; finished eighth grade and then spent two years in commercial school taking [94] bookkeeping and stenography. Then accepted a position with Presto Light Company, San Francisco, as bookkeeper; worked one and one-half years at $40.00 to $50.00 per month; was let out because he fell down on work. Worked two months as billing clerk for Southern Pacific Railroad. Then took position with Davis & Company, insurance brokers, as clerk. Worked five years and was drafted. Used alcoholics moderately in a social way. Smoked cigars occasionally. Denies masturbation. Contracted gonorrhea when about twenty years old; was treated by Dr. Bill, San Francisco. Lasted about two years. Finally cured by Dr. Apple. Was a good mixer; interested in athletics. Has been arrested twice; once for speeding on motorcycle, fined $10.00. Another time for speeding in automobile; fined $25.00." He never married. He says "Because he could not afford it." His military history, he stated "He was drafted May 17, 1917, at San Francisco. Sent to Monterey, California, and a few days later transferred to Camp Green. Assigned to Eighth Field Signal Battalion; about the middle of 1918 sent to balloon school, Fort Omaha. Contracted influenza during fall of 1918; in base hospital for about six weeks and returned to duty. About December, 1918, was made First Sergeant.

(Testimony of Dr. Elmer L. Crouch.)

Was sent to Presidio in charge of a detachment and discharged latter part of January, 1919. Honorable discharge without disability."

His post-war history is "After discharge went to parents' home; got a job washing cars. After two weeks was let out. Does not know why. Went to Reno, Nevada. Worked for Sierra Auto Supply Company stenographer and bookkeeper for two months and let out, too slow. Went to Yreka, California. Played baseball for about a month. Caught four games at $20.00 per game. Then went to Dunsmuir; got a job as extra brakeman on Southern Pacific Railway. Worked irregular- [95] ly for about two and a half years as extra. Did not get a regular run. Later, mother helped him buy a cheap car and he greased automobiles for regular customers for about six months. Then with a partner went into garage business at Divisadero and Grove Streets, San Francisco. Business was slow. After two years partner closed him out because he owed him $200.00 that he could not pay. Was in the middle of 1926. Since then, worked in a garage about two weeks during past summer. Mother states about four years ago patient complained of headaches and the family noticed he was nervous; talked funny; would make queer remarks, as he wanted to know what was to become of parents in their old age."

Mr. HJELM: Just a moment, four years ago, that would be four years back from what date?

A. Prior to this examination.

(Testimony of Dr. Elmer L. Crouch.)

Q. That would be 1923. All right.

"Would stay in bed all day; thought brother got the best of everything. During summer of 1926, family physician advised family to take patient for a trip. Was taken for a visit up to State of Washington and Idaho. Did not get interested. Would sit and stare. After they returned home, patent did not try to work. Had a fairly good appetite. After meals, would take a walk to park. Took tennis balls and racquet; would bounce balls around court but not participate in games. After dinner, he would take short walk and retire early and seemed to sleep all right. Movements were very slow and he seemed to have no initiative; would only do what he was told to do. Mother says doctor said patient had syphilis. Was taken to Dr. Gross, who made a blood test and injected something in hips on alternate days; was given about twelve injections. Also was given some electric treatments. Patient states he was told that he was being treated for [96] gonorrhea. Sister paid the bill of $225.00. Remained at home with parents until brought to this hospital, October 30, 1927, where he has since remained as a patient." His subjective complaints, that is the complaints that he made in answer to the questions what he complained of, he made no spontaneous complaints. In answer to questions when insisted on some kind of an answer he said, "Nothing. Don't feel sick. Never noticed any change in condition. I am like I always have been." Those were answers to questions that were asked him.

(Testimony of Dr. Elmer L. Crouch.)

Physical examination. Patient was negative for any physical diseases. Do you want me to read the physical examination? I will read it. "Patient is medium build, white male, fairly well developed and nourished. Height sixty-seven and three-quarter inches. Weight 147 pounds dressed. Skin is rather oily, brunette. No eruptions or cicatrices. Hair: Dark brown, moderately thick, oily. Male distribution. Nails smooth, long and unkempt. No palpable enlargements of lymph nodes or adenopathies. Thyroid not palpably enlarged. No stigmata, anomalies or deformities. Head: Moderately large. High, prominent forehead. Wears seven and a quarter hat. Palate dome shaped. Eyes: Brown. Ears, nose and throat normal. Teeth: several crowns and caries", Breaking down of the teeth, and here it refers to the dental report. "Mouth: Hygiene poor. Chest: Moderately broad, deep; mobility good. Palpation, percussion and ausculation negative. Breath sounds clear. No rales. Heart: Size and position within normal limits. P.M.I. Fifth interspace, midclavicular line. No murmurs, arrythmia or other abnormal sounds. Pulse: 72; after fifty hops, ninety; after two minutes, seventy-two. Blood pressure 138 systolic and 90 diastolic. Pulse was forty-eight. No varicosities or [97] thickening of superficial arteries. Abdomen and contained viscera: No tympanities, distension, tenderness or palpable masses. No hernia or hemorrhoids. Congenital urinary organs are—no abnormalities noted. Genitalia fairly well developed. Bones, joints and extremities: No abnormalities or deformities."

(Testimony of Dr. Elmer L. Crouch.)

Laboratory findings negative. Blood Wasserman was negative. The neurological examination was: "Cranial nerves: Rather marked facial stare. Palpebral fissures equal, rather wide. Seldom bats his eyes. Rather blank facial expression. Holds mouth rather firmly closed. Seldom swallows—mouth full of saliva. When patient speaks, has trouble in preventing saliva running out of mouth, otherwise no drooling present. No motor or sensory disturbances demonstrated. Pupils round, equal, react to light, accommodation and consensual. No nystagmus. No muscular weakness or history of diplopia. No special sense disturbances demonstrated. Tongue, broad, flabby, protruded in median line, slightly tremulous. No trouble in voluntary deglutition. Voice monotonous. No definite speech defect. Spinal nerves: No motor or sensory disturbances demonstrated. No ataxias or tremors. Station and gait: No swaying in Romberg position." The patient stands with heels and toes together with eyes closed or looking up as at the ceiling and if there is certain neurological diseases there then the patient sways or falls. That is negative. "Swings arms when he walks. Holds head and body rather stiffly. Does not look to right or left. No festination, propulsion or retropulsion. Voluntary movements are rather deliberate and slow. Passively, extremities are very flexible. There is present pronounced catalepsy; an extremity remains in any position placed until fatigue causes it to fall." In certain conditions the arms are placed in an [98] awkward position and

(Testimony of Dr. Elmer L. Crouch.)

remains there until the muscles tire out and fall. "Reflexes: superficial, cremasteric, abdominal and planter active with marked planter defense reaction. No Babinski, Chaddock or Oppenheim demonstrated. Deep biceps, triceps, patellar and ankle rather active. No clonus. No bladder or rectal sphincter disturbance. Vaso-motor: Skin flushes on stroking."

Now, the mental examination. "Patient walked into examining room slowly. Rather untidy and careless in personal appearance. Stood like a statue staring straight ahead. When requested to sit in chair, did so, continued to look straight ahead. When interrogated, would at times look at examiner and answer in more or less of a stereotyped manner. After an intermission of several seconds, had to elevate his chin and guard himself to prevent saliva from spilling over from mouth. Seldom batted or winked eyelids. Did not swallow. Volunteered no information. Did not speak only in answer to direct question. Manifested no interest in his surroundings; showed no evidence of emotion. Did not smile or show evidence of anger or embarrassmens. Gave age, birthday, home address, day of week, month and year but could not give date of admission to this hospital. Recognized place but didn't notice anything wrong with patients on ward because he said he did not pay any attention to them. In answer after questioning, said he was brought here by his mother and brother. That Walter Smith arranged for a doctor to come to the house to see him, and the

(Testimony of Dr. Elmer L. Crouch.)
next day he was brought down here. Why?'' The question was why. '' 'Told I was entitled to treatment here for the same as Dr. Gross was treating me. What were you treated for? Gonorrhea'. Patient does not recall dates in other respects and does not give a very straightforward account of his activities since service, especially for past two years. Has [99] a fairly good retention of school knowledge. Calculation fairly good. Answers to geographical and historical questions fairly accurate. Answers are very slow. Says he reads the papers, mostly about aviation. Could name several aviators. Not able to demonstrate any definite delusions or fixed ideas except mother states patient frequently says he is not treated as well as his brother, and that he frequently made queer disconnected remarks. Patient says he thinks there is nothing wrong with him. Answers to most questions are 'no' or 'I don't know'. Not able to demonstrate the presence of hallucinations. There is marked dulling of emotional tone. Attention fairly good. Reactions very much delayed. Associations very slow. There is a marked retardation or blocking of thought process with more or less of a stereotyped answer to questions on the most part of a negative character. Psychomotor activity retarded and blocked; shows marked cataleptic attitudes. At times, speech is somewhat explosive in character. Patient was admitted to this hospital through Regional Office, San Francisco, for treatment of 'Psychosis, Undiagnosed' October 30, 1927.

(Testimony of Dr. Elmer L. Crouch.)

"Summary: Patient apparently normal child. Gonorrhea prior to service. Had influenza in fall of 1918 in Base Hospital for six weeks. Denies delirium or double vision. Recovered and returned to duty, after which promoted to Sergeant. After discharge, had trouble holding jobs. Was let out four years ago. Began to have headaches about the same time noted his queer conduct and remarks. Gradually became less efficient. Would remain in bed all day. Sit and stare without speaking for long time, manifesting no interest. At present, some impairment of memory. More or less stereotyped movements and negative answers to questions. Dulling of emotional tone. Apparent blocking of thought processes. [100] Flexibility of muscles with marked catalepsy. Impairment of judgment and lack of insight suggest the diagnosis of dementia praecox, catatonic type."

Catatonic type is a type of dementia pratecox which is characterized by mannerisms, negativeness, that is opposed to what you want him to do and the most outstanding thing is this catalepsy, that he remains in a position you place him. Those are the most outstanding manifestations of catatonic type. "However residuals of encephalitis must be excluded."

I mean the after effects of—we had during the war and since the war a number of cases in which the infection that affects the brain, certain parts of the brain, and frequently in that case has complete recovery but there remain certain manifesta-

(Testimony of Dr. Elmer L. Crouch.)

tions of this diseased process that continue for a long time. Now, some of the manifestations of the acute condition are double vision, which is one of the most important diagnostic signs, and certain paralysis or weakness of muscles. We didn't find those but we take that into consideration for further observation to differentiate between encephalitis and dementia praecox.

Q. Did you find any residuals of encephalitis?

A. We didn't find any evidence of encephalitis.

Q. Did he or didn't he have encephalitis?

A. He did not.

A preliminary diagnosis was made of dementia praecox, paranoid type, or catatonic type, with notation that he should be observed for manifestations of encephalitis lethargica. It was my conclusion that he was then a dementia praecox subject.

The examination which I have outlined takes in various interviews with the patient covering a period of several days when he was in the ward. The purpose of the examination was [101] that he was sent to the hospital for treatment of psychosis, undetermined. It was just a regular routine hospital examination, without any reference to insurance or anything like that.

Q. From that examination that you made of him at that time and your examination as you have testified to in court, and assuming that the testimony of the defendant's witnesses as given here in court today be true—By the way, may I ask preliminarily, you have been in court here?

A. I have been.

(Testimony of Dr. Elmer L. Crouch.)

Q. And heard all the testimony of the defendant's case. Now then, by taking into consideration such testimony rendered in behalf of the defendant and the examination made by you as you have testified were you of an opinion as to whether or not he was wholly and totally disabled from performing any useful occupation, in let's say, March, 1919?

A. I have an opinion based on testimony that was given here this morning.

Q. And also on your own examination, as you have testified. You have formed an opinion?

A. Yes.

Q. And what is that opinion?

A. I think the man was able to follow a gainful occupation in March, 1919.

The COURT: When would you fix the time when you think the probabilities were he was unable to follow such an occupation?

A. From my own observations I couldn't fix the time, even attempt to fix the time of the onset but from the information or from the witnesses this morning the industrial letup occurred about 1922 or '23.

The COURT: In other words you believe that he was not afflicted up to that time with any dementia praecox?

A. There was no manifestation revealed here in the evidence [102] this morning that I caught.

The COURT: If this morning there was limited testimony by a certain woman, a woman whom he visited shortly after he left the service—

(Testimony of Dr. Elmer L. Crouch.)

A. Interposing: This morning was wholly, as I understand, devoted to his industrial activities after he came out of the service.

The COURT: Oh, I see. You would conclude from that——

A. Interposing: I would conclude from that that the man was able to carry on, yes, and continue—

The COURT: Interposing: Your attitude is it speaks for itself?

A. I think it speaks for itself.

The COURT: Let me ask you, are you one of those doctors who accept a doctrine that as soon as you can trace any act which deviated from normalcy sufficient to be identified as an act in dementia praecox that from that moment you establish it you consider he would be totally and permanently disabled from the first appearance of dementia praecox in its early stage?

A. Do you want me to answer that yes or no? Do you want me to—

The COURT: Interposing: Yes, certainly, I have no objection. In other words, you heard the testimony this morning. Now, do you accept the doctrine that just as soon as you can distinguish certain conduct connected with subsequent conduct to show the patient is dementia praecox even in the earlier stage, if we can use that term in that form of language, that that person was totally and permanently disabled as according to the definition which was given here by the Government?

(Testimony of Dr. Elmer L. Crouch.)

A. I don't consider it so. If we were to consider every dementia praecox and lock him up they would have a job in [103] order to build a hospital to lock them up in.

The COURT: In other words, you realize—I presume you make the statement you come in contact with a great many people who are affected with the earlier stages of dementia praecox?

A. I certainly would. Dementia praecox has an insidious slow onset. Sixty per cent, according to statistics, occurs in individuals with an inherent, what we call a biological defect; that is pertaining to their mental makeup and their ability to react to the situations. We cannot demonstrate a biological defect in the eyes no more than we can—

The COURT: Interposing: Do you classify a moron as a dementia praecox?

A. Not necessarily. A moron—the distinction between a moron and a dementia praecox is the moron never developed, never got anywhere. He never developed. Dementia praecox develops to a certain stage and then he breaks, so to speak. Praecox means prematurely demented. The climax was reached, the height in his life was reached at an early stage, and then he started down. Praecox usually starts around —formerly, before the word praecox was used the word adolescent insanity was used. It starts around adolescence and sometimes manifests itself as late as thirty-five years of age, some cases forty years of age.

(Testimony of Dr. Elmer L. Crouch.)

The COURT: What percentage of the population, do you consider, roughly, will be ultimately affected with that disease?

A. I don't know as there is any way of determining who might be—what portion will be affected but there are a great many people going about in everyday activities of life who are potential dementia praecox subjects. There are many praecoxes who went through the war without any disturbance. Usually a praecox comes on them and there is something of—it is a [104] splitting off of the personality of the individual, a change of personality. They begin to split off from the realities of life and they gradually go on until they become centered within themselves. They shut themselves up, as it were, in a shelf and there is a flattening of the emotions. The emotional tone is much greater—greater affected than the understanding, more earlier affected than the understanding and later on becomes retrograded. Go on high up in early life then go backward, some down the scale.

The COURT: Could you give us any test or any way, in other words, by which we could determine at the time of dementia praecox a person, who has that misfortune, reaches a point where they are totally and permanently disabled. What would be your test, what would be your observation, what would be their conduct or appearance or manners that would at once cause you to classify them as dementia praecox before they had reached a point where they are totally and permanently disabled?

(Testimony of Dr. Elmer L. Crouch.)

A. That would be when they are unable to make adjustment with their environment. Well, he might make an adjustment. He very often does carry on in a partially, at least, normal way up to some incident in his life when he breaks, when he begins to manifest his inability to make an adjustment. Possibly all—Insanity, we speak of it in a broad term. If a man is insane it is his inability to make adjustment to common standards of his neighbors and that very largely would depend on his environment, station in life.

The COURT: You haven't had enough facts in the case to enable you to be in a position to tell at what point it probably occurred?

A. Well, I think from the information, the impression had when I examined him and also the information here I should [105] say he became a social problem around 1922 or 1923, that is, he should be considered as a problem around 1922 or '23.

The COURT: Then he was totally and permanently disabled?

A. Yes, and I think he was begining and had got so far disabled at that time because then is when he began to make his, according to the history, when he first started in his inability to make economic and social adjustments.

The COURT: No further questions on the part of the Court.

Mr. HJELM: That is all.

(Testimony of Dr. Elmer L. Crouch.)

Cross Examination

An early dementia praecox shows, dependent upon the type, some mannerisms, some flattening of the emotions and particularly in the catatonic type, they are characterized also by periods of excitement and periods of depression. They are the things that show themselves early with the disease. Later in the disease they begin to show the deterioration. The personality change is the one early manifestation, a gradual onset is noted fairly early in the disease. It is inability to make adjustment to his environment.

Q. If you had a case of a young man who was neat in his appearance prior to a certain time, affable, agreeable, sociable, reliable in his work, efficient in his work, and something occurred and immediately after he is unable—undependable in his work, inefficient, uninteresting, dull, not interested in conversation, rather dull mentally toward intimate friends, would you say that would be—what a personality change in that respect would indicate?

A. That would indicate—it might indicate a dementia praecox dependent on what develops. [106]

Q. Well, you have sat in court and heard the testimony in this case?

A. Yes.

Q. You heard the description of his former employer in this particular case Mr. Romani, and Mrs. Martin, who was in the same office with him, that he acted dull, absolutely different from the way he appeared before he went to war. Would you say if that

(Testimony of Dr. Elmer L. Crouch.)

testimony be true that he undoubtedly had dementia praecox in the spring of 1919?

A. Oh, might be manifestations, early manifestations of praecox.

Q. Yes. Now, Doctor, do you believe like these dostors who testified for the plaintiffs, Dr. Conzelman of Stockton State Hospital and Dr. Wilder, in town here, that an acute infection could cause dementia praecox or be the exciting cause that sets it in motion?

A. It is not the usual history on cases of dementia praecox.

Q. But it is not unusual, is it?

A. It might happen.

Q. In this particular case you have heard the testimony here. Don't you think this man had encephalitis instead of influenza in the fall—

A. Interposing: If I thought so I would have said so.

Q. What?

A. If I thought so I would have said so on my examination. I didn't find anything that manifested, any manifestations of encephalitis.

Q. There were symptoms of encephalitis, were there not?

A. The symptoms didn't fit into encephalitis at all.

Q. Didn't you suspect encephalitis?

A. That diagnosis would have been made before he came to the hospital.

(Testimony of Dr. Elmer L. Crouch.)

Q. Now, Doctor, a mask-like expression and headaches, would that indicate, it would make you strongly suspect encephalitis [107] lethargica or sleeping sickness?

A. I don't think that alone would.

Q. Well, they are two of the common symptoms?

A. Headache is a common symptom—Headache is a common symptom dependent upon the location of the headache, depending largely upon the part of the brain involved. A mask-like face, his expression, may or may not be a manifestation of praecox or of encephalitis. In the testimony of Sergeant Barrett, where it is stated that Eide complained of headaches and seemed sleepy and drowsy and tired all the time, that might very easily have come from influenza.

Q. It would also be present in an acute stage of encephalitis, wouldn't it?

A. Yes. It might come from any other infection.

Referring to the fact that a number of patients at the mental hospital play baseball, I think that they attempt to have the patient exercise and get interested in something. I don't think they play very strong baseball. Most of the baseball games in the hospital are played by employees. They try to get them interested in anything that will open up an interest to the man who could play baseball. I can't very well conceive that a man could catch a game of ball, of baseball, with his judgment very badly disturbed. It is true that insanity very seldom runs an even course, a man will get better or worse, has

(Testimony of Dr. Elmer L. Crouch.)

periods of remission when he gets better and then he gets worse. During their praecox they have periods, sometimes they are worse than other times.

Q. Don't you think it is possible Mr. Eide in this case could have been in a period of remission when he was up at Dunsmuir trying to work for the railroad?

A. Well, there wasn't anything manifested, there wasn't anything to my mind brought out to indicate this man had any [108] active psychosis until 1922 or 1923.

Q. As a matter of fact don't the hospital records show, Doctor, at the beginning of the incompetency, it started in 1919?

A. We will refer to the record. There is a question mark there.

Q. Well, I will read you here, "Is patient bedridden? No. Is patient competent? No. If not approximate date of beginning of incompetence? 1919", with a question mark after it. What does that indicate?

A. He was incompetent when—the fact, here, that he was incompetent all the time he was in the hospital.

Q. Do you think that record is correct or incorrect when it says the beginning of the incompetency started in 1919?

A. I don't know who put the question mark on there. I do not know whether or not he had gonorrhea, that is his statement. At one time he denied any venereal disease and another time he says he was treating with a doctor. I did not find any evi-

(Testimony of Dr. Elmer L. Crouch.)

dence of gonorrhea. He said he had had it when he was twenty years old or something like that. Even if he had had gonorrhea I don't think it would have had anything to do with his present mental condition. He did not have any syphilis, at the time of my examination. He gave a history of having been treated for it and I don't think that this was an hallucination.

Q. At the time he gave you the history he was insane, was he not?

A. Well, he answered—his intellect wasn't disturbed but what he answered fairly intelligently to questions.

I don't think that syphilis has anything to do with dementia praecox, as the insanity caused by syphilis is of an entirely different type. There was no evidence of tuberculosis and the fact that the Romberg test showed negative is [109] not a factor in determining praecox. There was no manifestation of an organic disease demonstrated. Double vision is one of the first manifestations in encephalitis lethargica.

I think shutting a patient up in the early stages of dementia praecox is not only good practice—I think what causes the praecox to react is the difficulty of adjustment and the difficulty in finding themselves and something should be done to waken them with a certain thing, a line that they are interested in. That is part of the treatment of praecox. They make adjustment under supervision.

TESTIMONY OF DR. RICHARD T. O'NEIL,

called as a witness for the defendant, after being duly sworn, testified as follows: [110]

I graduated from Emory University, Atlanta, Georgia, in 1915. I have followed psychiatry since 1919. I have been with the Veterans Administration since 1923 and am at the hospital at Palo Alto. I know Mr. Eide and I examined him on June 11, 1930. I was one of a board of three of which Dr. Crouch was one of the members. Exhibit 5-C in evidence bears my signature and is the report that I made at that time. The examination is similar to that which Dr. Crouch has testified to giving a family history, personal history, military history and post-war history. Physical examination was a very little change, I am sure. Neurological, at that time, were very little changed. We made an examination. He thought he had an umbilical hernia and we called in a surgeon and found none. In his mental examination, quite a little difference since his admission to the hospital. Since his admission to the hospital the patient's condition required supervision. At periods he became contentious, impulsive, attacking patients and attendants. For long periods he would not eat unless spoon fed, became untidy, careless and destructive. At the present time he was rather tidy in personal appearance. Came into the examining room with an attendant, stood like a statue, staring straight ahead, mask-like appearance of face, slow in his movements. When questioned answered slow, when questions were asked he

(Testimony of Dr. Richard T. O'Neil.)

answered slow after yes or no. Volunteered no information and frequently answers a question with "When can I go?" Shows no interest in surroundings, no evidence of any emotion. Memory poor. To many questions would reply "I don't know." His retention of school knowledge was poor, making mistakes in simple calculations, refusing to answer. He was oriented from place and person and could not give date but named the hospital and ward surgeon. He stated that he hears voices, pays no attention to them and will not tell what he [111] hears, both men and women's voices. They tell him "To save the world, as we will all die tonight." The history goes further—

Q. Interposing: You made a diagnosis at that time?

A. Yes.

Q. What was it, dementia praecox?

A. Dementia praecox.

Q. In your diagnosis did you make any finding of encephalitis?

A. Well, not in this case. Well, not in this history. I have noticed from reading the reports of the hospital this patient did—we make the suggestion to the staff that encephalitis should be considered. However, as time went on the praecox symptoms became so pronounced that if there was any evidence of encephalitis it was taken up in the progress of the praecox.

Q. Then you finally concluded that there was no question but what this was dementia praecox and there was no encephalitis?

(Testimony of Dr. Richard T. O'Neil.)

A. Well, I won't say there wasn't any encephalitis but if there was encephalitis it was to such a degree that it didn't show any evidence, very mild.

I will admit my opinion that this man was and is constitutionally psychopathic, psychopathic inferiority—he was born an inferior, biological defect. He was a potential praecox all his life and probably went through his early life and in the army, but I find from his history and the testimony I have heard in the court that his psychosis busted through and became pronounced around in 1922 or 1923.

The COURT: When you say it broke through at that time, it became pronounced, you mean at the time it had reached a degree which made him totally and permanently disabled as it is defined in that definition?

A. Yes.

In other words there came a time when he was un- [112] able to adjust himself to the ordinary standard of life. These individuals, we all have to protect our ego and the ability to protect that ego was such that he went out. Praecox to me is not a disease, it is a condition. As long as these men evidence that their behavior is good and they make some economic adjustment they are not total and permanent. It is a condition of the mind of the being and when that condition is such that he can adjust himself to the fellows he is working with and his surroundings, then the praecox has not yet broken out.

(Testimony of Dr. Richard T. O'Neil.)

Q. By the way, Doctor, something was said about treatment, supervision. Would you say that a patient who was born, who was prenatally, predisposed to dementia praecox, who was working as a fireman and playing baseball as Sundays, would you say that would be conducive to maintaining that ability to adjust things, or the other way?

A. Well from his action I should think that occupation would be the best therapeutic one could have.

Q. You say therapeutic. Does that mean that you as a doctor would advise that he should follow an occupation in order to prevent—

A. Interposing: Yes.

Q. Then you would say that any individual, whether he be a lawyer or otherwise, that it is a good idea for him to practice law if he is a lawyer, in order to prevent him from becoming an introspective?

A. Providing that profession is tasteful.

Cross Examination.

In some degree I think it is best for persons with dementia praecox to work. I wouldn't send Eide out now to work. Before his actions become bizarre, it is best in my opinion that a man should be given employment. Of course, when this psychosis becomes manifest so he becomes hallucinated [113] and gives up to such a degree that he can't make an adjustment, it is my opinion of course that this treatment is desirous. When a psychotic patient is sick enough to reach an institution after the mental

(Testimony of Dr. Richard T. O'Neil.)

regression, dilapidation of personality, I very seldom see any of them adjusted to such a degree that they can go out. I said I thought that Eide did have, to me, some symptom of encephalitis. He could have had both encephalitis and dementia praecox because one is an organic condition and the other is functional. I don't believe that this dementia praecox could have been set in motion by an acute infection like encephalitis. I have never seen any case of dementia praecox at an autopsy, where they have been performed, where they have put a finger on anything that we could attribute to psychosis. I think it is purely a functional affair. We see sometimes extra convolutions and we found men who had extra convolutions who never had dementia praecox. Dementia praecox is purely a functional disease. There is a split in the personality between the emotions and the energy. Some people are incompetent in some way and yet they are put under supervision and after making an adjustment make a living.

Q. When do you think his incompetency began?

A. Well, I can't put a specific date except I would say from what I heard in the courtroom the last two days, what you say in testimony, I would say around 1922 or 1923.

Q. That is your signature, isn't it, Doctor? (Exhibiting document to witness).

A. Yes.

Q. I will ask you if you didn't—did you type this report up, was it made under your supervision?

A. Under my direction, yes.

(Testimony of Dr. Richard T. O'Neil.)

Q. This states: "Is he competent? A. No. If not approximate date of beginning of incompetency? 1919", with a question [114] mark.

A. Yes.

Q. Now, what do you say?

A. Well, I say that 1919 if we didn't feel that he was incompetent in 1919 we put the question mark there. We were undetermined. It was questionable if the man was competent or incompetent in 1919 on the information we then had at our hands.

Q. In other words you thought he was incompetent in 1919 but you weren't quite sure so you put a question mark?

A. Well, it would fit either way.

The only information which I obtained was that which I obtained from the family.

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## TESTIMONY OF MRS. BERTHA EIDE,

Called in rebuttal as a witness for the plaintiff.

When Arthur was working for the Southern Pacific Company at Dunsmuir he would come home and I would see him. He was very nervous and he had headaches just the same. I recall when he worked for the Merchants' Garage. He was there about three months at $50.00 a month. I think he was nightwatchman or something like that, washing cars.

Mr. GERLACK: That is the plaintiff's case.

(Testimony of Mrs. Bertha Eide.)

Mr. LYNCH: At this time, your Honor, I would like to make a motion for a directed verdict on the ground that no evidence has been brought forth to prove the plaintiff was permanently and totally disabled on the date alleged.

The COURT: The same will be denied. I think it is a matter for the jury.

Mr. LYNCH: May I have an exception, your Honor? [115]

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Thereupon the jury retired and returned a verdict for plaintiff and fixed the date of permanent and total disability as of January 29, 1919.

On March 9, 1934, the following stipulation and order was entered into by and between the parties hereto and filed under date of March 12, 1934.

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action that the defendant may have to and including the 31st day of May, 1934, within which to prepare, file and serve its proposed bill of exceptions, and

IT IS FURTHER STIPULATED AND AGREED that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the April 1934 term of said Court to the 10th day of June, 1934,

thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled Court and an order was made by the said Honorable Judge on the 10th day of March extending the term of the court to and including the date set forth in the stipulation. This order was filed on March 12, 1935.

And thereafter on the 8th day of May, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 9th day of June, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the October 1933 term of the above-entitled court, within which the judgment therein was entered and [116] which is extended by and under the terms of Rule 45 of the Rules of this court, be extended to and into and so as to include the April 1934 term of said court to the 29th day of June, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court and an order was made by the said Honorable Judge on the 9th day of May, 1934, extending the term of the court to and including the date set forth in the stipulation. This order was filed on May 10, 1934.

And thereafter on the 12th day of June, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in

this case, defendant could have to and including the 11th day of July, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the April 1934 term of said court to the 31st day of July, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court and an order was made by the said Honorable Judge on the 12th day of June, 1934 extending the term of the court to and including the date set forth in the stipulation. This order was filed on June 13, 1934.

And thereafter on the 10th day of July, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 11th day of August, 1934, [117] and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the April 1934 term of said court to the 31st day of August, 1934, thereof. This stipulation was ap-

proved by the Honorable Judge Louderback, Judge of the above-entitled court and an order was made by the said Honorable Judge on the 13th day of July, 1934, extending the term of the court to and including the date set forth in the stipulation. This order was filed on July 14, 1935.

And thereafter on the 9th day of August, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 11th day of September, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the April 1934 term of said court to the 1st day of October, 1934, thereof. This stipulation was approved by the Honorable A. F. St. Sure, Judge of the above-entitled court and an order was made by the said Honorable Judge on the 15th day of August, 1934, extending the term of the court to and including the date set forth in the stipulation. This order was filed on August 16, 1934.

And thereafter on the 10th day of September, 1934, [118] it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to

and including the 13th day of September, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the April 1934 term of said court to the 20th day of September, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court and an order was made by the said Honorable Judge on the 10th day of September, 1934, extending the term of the court to and including the date set forth in the stipulation. This order was filed on September 11, 1934.

And thereafter on the 11th day of October, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 12th day of October, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the October 1934 term of said court to the 2nd day of November, 1934, thereof. This stipulation was

approved by the Honorable Harold Louderback, Judge of the above-entitled court and an order was made by the said Honorable [119] Judge on the 16th day of October, 1934, extending the term of the court to and including the date set forth in the stipulation. This order was filed on October 17, 1934.

And thereafter on the 11th day of October, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 13th day of November, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the October 1934 term of said court to the 4th day of December, 1934, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court and an order was made by the said Honorable Judge on the 15th day of October, 1934, extending the term of the court to and including the date set forth in the stipulation. This order was filed on October 17, 1934.

And thereafter on the 12th day of November, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions

in this case, defendant could have to and including the 13th day of December, 1934, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of [120] Rule 45 of the Rules of this Court, be extended to and into and so as to include the October 1934 term of said court to the 3rd day of January, 1935, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court and an order was made by the said Honorable Judge on the 13th day of November, 1934, extending the term of the court to and including the date set forth in the stipulation. This order was filed on November 14, 1934.

And thereafter on the 11th day of December, 1934, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 13th day of January, 1935, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the October 1934 term of said court to the 23rd day of January, 1935, thereof. This stipulation was

approved by the Honorable Harold Louderback, Judge of the above-entitled court and an order was made by the said Honorable Judge on the 13th day of December, 1934, extending the term of the court to and including the date set forth in the stipulation. This order was filed on December 14, 1934.

And thereafter on the 9th day of January, 1935, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant [121] could have to and including the 13th day of February, 1935, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the October 1934 term of said court to the 4th day of March, 1935, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court and an order was made by the said Honorable Judge on the 10th day of January, 1935 extending the term of the court to and including the date set forth in the stipulation. This order was filed on January 11, 1935.

And thereafter on the 10th day of February, 1935, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including

the 13th day of March, 1935, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the October 1934 term of said court to the 2nd day of April, 1935, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court and an order was made by the said Honorable Judge on the 11th day of February, 1935, extending the term of the court to and including the date set forth in the stipulation. This order was filed on February 13, 1935. [122]

And thereafter on the 11th day of March, 1935, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 13th day of April, 1935, and it was further stipulated and agreed that for the purpose of settling, signing and filing the bill of exceptions in the above-entitled case, the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the April 1935 term of said court to the 2nd day of May, 1935, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-

entitled court and an order was made by the said Honorable Judge on the 11th day of March, 1935, extending the term of the court to and including the date set forth in the stipulation. This order was filed on March 12, 1935.

And thereafter on the 11th day of April, 1935, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 13th day of May, 1935, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the April 1935 term of said court to the 1st day of June, 1935, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court and an [123] order was made by the said Honorable Judge on the 13th day of April, 1935, extending the term of the court to and including the date set forth in the stipulation. This order was filed on April 16, 1935.

And thereafter on the 9th day of May, 1935, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 13th day of June, 1935, and it was further stipu-

lated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the April 1935 term of said court to the 3rd day of July, 1935, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court and an order was made by the said Honorable Judge on the 9th day of May, 1935, extending the term of the court to and including the date set forth in the stipulation. This order was filed on May 10, 1935.

And thereafter on the 11th day of June, 1935, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 13th day of July, 1935, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of [124] the Rules of this Court, be extended to and into and so as to include the April 1935 term of said court to the 31st day of July, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court and an order was made by the

said Honorable Judge on the 14th day of June, 1935, extending the term of the court to and including the date set forth in the stipulation. This order was filed on June 15, 1935.

And thereafter on the 11th day of July, 1935, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 13th day of August, 1935, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the April 1935 term of said court to the 2nd day of September, 1935, thereof. This stipulation was approved by the Honorable A. F. St. Sure, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 11th day of July, 1935, extending the term of the court to and including the date set forth in the stipulation. This order was filed on July 12, 1935.

And thereafter on the 12th day of August, 1935, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 13th day of September, 1935, and it was further stipulated and agreed that for the purpose [125] of

preparing, settling, signing and filing the bill of exceptions in the said case the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the April 1935 term of said court to the 3rd day of October, 1935, thereof. This stipulation was approved by the Honorable A. F. St. Sure, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 13th day of August, 1935, extending the term of the court to and including the date set forth in the stipulation. This order was filed on August 14, 1935.

And thereafter on the 11th day of September, 1935, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 12th day of October, 1935, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the October 1935 term of said court to the 2nd day of November, 1935, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 13th day

of September, 1935, extending the term of the court to and including the date set forth in the stipulation. This order was filed on September 18, 1935.

And thereafter on the 9th day of October, 1935, it was stipulated by and between the parties to the above- [126] entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 28th day of October, 1935, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the October 1935 term of said court to the 16th day of November, 1935, thereof. This stipulation was approved by the Honorable A. F. St. Sure, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 10th day of October, 1935, extending the term of the court to and including the date set forth in the stipulation. This order was filed on October 10, 1935.

And thereafter on the 26th day of October, 1935, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 28th day of November, 1935, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of excep-

tions in the said case the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the October 1935 term of said court to the 14th day of December, 1935, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 26th day of October, 1935, extending the term of the court [127] to and including the date set forth in the stipulation. This order was filed October 28, 1935.

And thereafter on the 27th day of November, 1935, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the bill of exceptions in this case, defendant could have to and including the 28th day of December, 1935, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the proposed bill of exceptions in the said case the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the October 1935 term of said court to the 6th day of January, 1936, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 28th day of November, 1935, extending the

term of the court to and including the date set forth in the stipulation. This order was filed on November 29, 1935.

And thereafter on the 26th day of December, 1935, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the proposed bill of exceptions in this case, defendant could have to and including the 28th day of January, 1936, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the bill of exceptions in the said case the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the October 1933 term of said court to [128] the 20th day of February, 1936, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 27th day of December, 1935, extending the term of the court to and including the date set forth in the stipulation. This order was filed on January 2, 1936.

And thereafter on the 25th day of January, 1936, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the proposed bill of exceptions in this case, defendant could have to and including the 28th day of February, 1936, and it was further stipulated and agreed that for the

purpose of preparing, settling, signing and filing the bill of exceptions, in the said case the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the October 1935 term of said court to the 19th day of March, 1936, thereof. This stipulation was approved by the Honorable Harold Louderback, Judge of the above-entitled court, and an order was made by the said Honorable Judge on the 27th day of January, 1936, extending the term of the court to and including the date set forth in the stipulation. This order was filed on January 30, 1936.

And thereafter on the 27th day of February, 1936, it was stipulated by and between the parties to the above-entitled action that for the purpose of preparing, serving and filing the engrossed bill of exceptions in this case, defendant could have to and including the 15th day of March, 1936, and it was further stipulated and agreed that for the purpose of preparing, settling, signing and filing the en- [129] grossed bill of exceptions in the said case the October 1933 term of the above-entitled court within which the judgment therein was entered and which is extended by and under the terms of Rule 45 of the Rules of this Court, be extended to and into and so as to include the October 1935 term of said court to the 4th day of April, 1936, thereof. This stipulation was approved by the Honorable Harold Louderback on the 27th day of February, 1936,

extending the term of the court to and including the date set forth in the stipulation. This order was filed on February 28, 1936.

Dated: February 27, 1936.

AL GERLACK,
Attorney for Plaintiff.
H. H. McPIKE,
United States Attorney.
Attorney for Defendant. [130]

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STIPULATION.

IT IS HEREBY STIPULATED by and between the above-entitled parties and their respective counsel that the foregoing bill of exceptions is true and correct, and that the same may be settled and allowed by the above-entitled court and made a part of the record in this case.

AL GERLACK,
Attorney for Plaintiff.
H. H. McPIKE,
United States Attorney.
Attorney for Defendant.

ORDER APPROVING AND SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions is duly proposed and agreed upon by counsel for the respective parties, is correct in all respects, and is hereby approved, allowed and settled and made a part of their record herein, and said bill of exceptions may

be used by either parties plaintiff or defendant upon any appeal taken by either parties plaintiff or defendant.

Dated: March 14, 1936.

HAROLD LOUDERBACK,
United States District Judge. [131]

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[Title of Court and Cause.]

ORDER RE TRANSMITTAL OF EXHIBITS TO CIRCUIT COURT OF APPEALS.

IT IS HEREBY ORDERED that all of the original exhibits may be withdrawn from the files of the above-entitled Court and of the Clerk hereof, and by said Clerk transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as a part of said record on appeal; said original exhibits to be returned to the files of the above-entitled Court upon the determination of said appeal by said Circuit Court of Appeals.

Dated: This 30th day of March, 1936.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Apr. 1, 1936. Walter B. Maling, Clerk. [132]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of said Court:

Sir:

Please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore sued out and perfected to said court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. Complaint.
2. Answer to complaint.
3. Petition for appeal.
4. Order allowing appeal.
5. Assignment of Errors.
6. Citation on appeal.
7. Bill of exceptions.
8. Stipulation and order extending time and term within which to file bill of exceptions to March 15, 1936.
9. Order re transmittal exhibits to Circuit Court.
10. Judgment.
11. This praecipe.

H. H. McPIKE,
United States Attorney.
Attorney for Defendant.

Service of the within praecipe by copy admitted this 30th day of March, 1936.

ALVIN GERLACK,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 1, 1936. Walter B.

## CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 133 pages, numbered from 1 to 133, inclusive, contain a full, true and correct transcript of certain records, and proceedings in the case of Arthur J. Eide, etc. vs. United States of America, No. 991 Law, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Thirty-two and 40/100 ($32.40) Dollars.

Annexed hereto is the original citation on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of April, A. D. 1936.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [134]

United States of America.—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To ARTHUR J. EIDE, by Bertha K. Eide, his Guardian ad Litem, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California wherein the United States of America, appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Harold Louderback United States District Judge for the Northern District of California this 28th day of May, A. D. 1934.

HAROLD LOUDERBACK,
United States District Judge.

Receipt of a copy of the citation is admitted this ..... day of May, 1934. [135]

[Endorsed]: Filed May 28, 1934. Walter B. Maling, Clerk.

[Endorsed]: No. 8178. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Arthur J. Eide, by Bertha K. Eide, his Guardian ad Litem. Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 22, 1936.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

# No. 8178

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

UNITED STATES OF AMERICA,
*Appellant,*

vs.

ARTHUR J. EIDE, by BERTHA K. EIDE, his Guardian ad Litem,
*Appellee.*

**Appeal From the District Court of the United States for the Northern District of California, Southern Division.**

## BRIEF FOR APPELLANT.


H. H. MCPIKE,
United States Attorney,
THOMAS C. LYNCH,
Special Assistant to the United States Attorney,
*Attorneys for Appellant.*

JULIUS C. MARTIN,
Director, Bureau of War Risk Litigation,
WILBUR C. PICKETT,
Special Assistant to the Attorney General,
THOMAS E. WALSH,
Attorney, Department of Justice,
*Of Counsel.*





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No. 8178

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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UNITED STATES OF AMERICA,
*Appellant,*

vs.

ARTHUR J. EIDE, by BERTHA K. EIDE, his Guardian ad Litem,
*Appellee.*

**Appeal From the District Court of the United States for the Northern District of California, Southern Division.**

## BRIEF FOR APPELLANT.

### STATEMENT OF THE CASE.

This is a war risk insurance case in which the Government is appealing from a judgment rendered in the plaintiff's favor below, contending that there was no substantial evidence to support the jury's verdict finding the insured totally and permanently disabled during the life of the insurance contract, and that medical opinion testimony on the ultimate issue of total permanent disability was improperly received.

The suit was instituted by Bertha K. Eide as guardian ad litem of Arthur J. Eide on a $10,000 war risk contract which the said Arthur Eide obtained during military service and which he continued in force through the date of his discharge from the

military service, January 29, 1919, by the deduction of premiums from his military pay. For her cause of action she alleged that ever since January 29, 1919, the insured has been totally and permanently disabled by reason of "certain diseases, injuries and disabilities resulting in and known as neuro-psychiatric disease, and other disabilities as shown by the records and files of the Veterans' Administration", and that the insurance contract matured on that date (R. 2-5).

The United States filed an answer denying each and every allegation contained in the petition and issue was thus joined on the question as to whether this war risk insurance contract had matured on or before January 29, 1919, by reason of total permanent disability.

During the trial it was stipulated that the insured had entered the military service July 23, 1917, remaining therein until discharged on January 29, 1919; that he obtained war risk term insurance in the sum of $10,000, upon which sufficient premiums were paid to continue the policy in force up to and including midnight of July 1, 1919; that a claim for insurance presented to the Veterans' Administration on April 22, 1929, had been denied on June 29, 1932 (R. 47).

The case was tried in February, 1934, before the Honorable Harold Louderback, District Judge, and a jury, resulting in a jury verdict for the plaintiff finding the insured totally and permanently disabled from January 29, 1919 (R. 7-8). Judgment based thereon was entered in the cause, allowing the recovery of insurance installments in the monthly amount of $57.50 from January 29, 1919 (R. 7-9).

Before the case was submitted to the jury and at the conclusion of all the evidence, a motion for a directed verdict was made by the Government counsel and an exception was taken to the order of the court overruling the motion (R. 135). The ruling on this motion is the only error properly assigned, but during the trial several medical witnesses were permitted to express opinions as to whether they considered the insured totally and permanently disabled (R. 42, 43, 51, 52, 65, 81, 82, 89), and the admission of this testimony is urged as an additional ground for reversal.

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## QUESTIONS PRESENTED.

1. Whether there was any substantial evidence to show that the insured became totally permanently disabled on January 29, 1919.

2. Whether reversible error was committed in the introduction of medical opinion testimony on the ultimate issue of total permanent disability.

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## ASSIGNMENT OF ERRORS.
(R. 10.)

### II.

The District Court erred in denying defendant's motion for a directed verdict on the ground that the evidence was insufficient to sustain the allegation of the complaint to (9) the effect that the plaintiff became totally and permanently disabled prior to the date of lapse of his insurance policy.

## PERTINENT STATUTES AND REGULATIONS.

Section 5 of the World War Veterans' Act of 1924, as amended July 3, 1930, c. 849, sec. 1, 46 Stat. 991 (U. S. C., Title 38, Sec. 426), is in part as follows:

> The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, * * *.

Pursuant to the authority contained in Section 13 of the War Risk Insurance Act, 40 Stat. 399, there was promulgated on March 9, 1918, Treasury Decision No. 20, reading in part as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *.

---

## ARGUMENT.

### I.

### THERE WAS NO SUBSTANTIAL EVIDENCE OF TOTAL PERMANENT DISABILITY ON JANUARY 29, 1919.

The test of total disability under a war risk insurance contract is whether an insured suffers from some impairment of health, mental or physical, which ren-

ders it impossible for him to pursue any substantially gainful occupation with reasonable regularity and without serious injury to health. The burden of proving that such a disability has developed during the life of the insurance contract and is reasonably certain to continue throughout the insured's lifetime is upon the person suing. *Lumbra v. United States,* 290 U.S. 551; *United States v. Spaulding,* 293 U.S. 498, rehearing denied, 294 U.S. 731. When the evidence shows that the insured has been gainfully employed for substantial periods after the date of his alleged total and permanent disability without injury to his health, the burden of proof is not carried and the plaintiff is not entitled to a recovery, for it is well settled that a substantial work record refutes the claim. *Lumbra v. United States,* supra; *United States v. Spaulding,* supra; *Deadrich v. United States,* 74 F. (2d) 619 C.C.A. 9th); *United States v. Alvord,* 66 F. (2d) 455 (C.C.A. 1st), certiorari denied, 291 U.S. 661; *Grant v. United States,* 74 Fed. (2d) 302 (C.C.A. 5th), certiorari denied, 295 U.S. 735; *United States v. Gwin,* 68 F. (2d) 124 (C. C. A. 6th); *United States v. Brown,* 76 F. (2d) 352 (C.C.A. 1st).

A review of the evidence relied upon by the plaintiff to prove her claim that the insured was totally and permanently disabled on January 29, 1919, discloses that, although there was evidence to show that he was changed in appearance and conduct after his return home from the military service in January of 1919, he was gainfully employed most of the time thereafter until at least April, 1922, including employment by the Southern Pacific Railroad, during which

his earnings were $2395.18. In November, 1927, he entered a Government hospital, afflicted with dementia praecox, and he has been hospitalized most of the time since then. A summary of the evidence follows:

SUMMARY OF THE EVIDENCE.

Before he entered the military service insured worked as a clerk in an insurance broker's office at a monthly salary of $85 (R.18). According to the testimony of his working associates and friends he was a happy, energetic, normal individual in his work and ways (R. 14, 17-18).

During military service he contracted influenza either in September or October, 1918, spending a month in the hospital (R. 22-23). Upon return to duty he seemed to be in poor health, lacked pep and complained of severe headaches and pains in the back of his head, according to the testimony of a comrade (R. 22-23). For a time he was given light assignments.

Just prior to discharge in January, 1919, while stationed at Presidio, he visited his home in San Francisco and on this occasion his mother observed that he had "no expression at all". He looked so different that she inquired what was the matter with him and his response was that he had left some men on Market Street and had to hurry. He stayed home about five or ten minutes (R. 27).

At discharge he signed a statement to the effect that he was not suffering from any impairment of mind

or body. The surgeon who examined him at that time certified that he was free from disability and his commanding officer signed a statement to the same effect (R. 90; Defendant's Exhibit No. 1).

After discharge he returned home and lived with his mother most of the time thereafter until he entered the hospital at Palo Alto in 1927 (R. 27-28). His mother testified that he suffered from severe headaches for three or four or maybe more years (R. 27-28). She observed a fixed stare on his face and a change in his conduct manifested by nervousness and a disinclination to see any of his friends (R. 27-28). She thought his condition had remained the same ever since and she did not consider him crazy (R. 28). A friend and prewar business associate testified that he met the insured in July or August of 1919 and observed that he "seemed different". Again he had occasion to observe the insured in the year 1923 while the latter was working in a garage, and that at that time he concluded that the insured "acted irrational" (R. 15). He could not say whether insured was rational or irrational from 1919 to 1923 (R. 16). The manager of the insurance brokerage office stated that the insured appeared changed when first seen after his return from military service, and that when he was offered his old job back he seemed indifferent (R. 17), so much so that the manager inquired of one of insured's former associates if he knew what was the matter (R. 18). Arthur Hammer, a friend and business partner, stated that when he first saw the insured in September, 1919, he "seemed kind of distant,

didn't seem to have the same manner about him. He seemed to have a faraway look, seemed to be looking into blank space" (R. 20).

Lucia Martin, a friend and associate in the insurance brokerage office, stated that when she first saw the insured in the early spring of 1919 she thought that he was irrational (R. 34-35). She formed the opinion that he was insane because he was not friendly, pleasant or courteous and had a fixed stare on his face, in contrast to his conduct and appearance before service (R. 37).

In the year 1919 he worked at several occupations for various periods. The exact time that he worked in 1919 was not shown, but it appeared from a statement which he had made in an application for employment with the Southern Pacific Railroad Company that he was engaged as a clerk with the United States Housing Corporation, Vallejo, California, from April 1, 1919, to June 1, 1919, and as a mechanic in the Merchants Garage, San Francisco from September 1, 1919, to April 1, 1920 (R. 106). In a second application presented to the same company he represented that he had worked as a stenographer with the United States Housing Corporation at Vallejo, California, from February, 1919, to May, 1919, and as a stenographer and bookkeeper with the Sierra Auto Company, Reno, Nevada, from May, 1919, to December, 1919 (R. 107).

Mrs. Eide, insured's mother, testified that after he came out of the army he first went to work in the

Merchants Garage, remaining there for one week when he was fired because of headaches (R. 30-31). She stated that he did no work after this for a whole year, and then was next employed at the Terminal Garage for a three months' period in 1920 (R. 30). However, when asked if he had not worked at Vallejo in 1919 she admitted that he had worked at that place for about four or five weeks possibly in 1919. She also knew of his employment with the Sierra Auto Company in Reno, even though she did not remember the month or the year that he was so employed. She did not think he had worked as long as from May, 1919, until July, 1919 (R. 30). She did not know how many jobs he had held from the time he came back from the service until he entered the hospital in 1927 (R. 28).

In 1920 he worked in a garage for several months (R. 30-31, 106-107), played Sunday baseball for pay (R. 30, 106), and also was employed by the Southern Pacific Railroad Company (R. 93-94). From his mother's testimony it appears that he worked in a garage for about three months and then quit because of severe headaches (R. 28-29). From the insured's own statement in the first application presented to the Southern Pacific, it appears that he was employed in the Merchants Garage, San Francisco, from September 1, 1919, to April 1, 1920 (R. 106). However, in his second application he represented that he had been employed in a garage from January, 1920, to June, 1920 (R. 107).

Henry Bogel, a car washer employed by Levinson Bros., testified that the insured had worked for that company for six months in 1920 as a floorman selling gasoline and oil, working from 8 in the morning until 6 at night. He did not observe anything wrong with him during this six months' period (R. 91).

In the summer of 1920 he played Sunday baseball and engaged in practice sessions two or three nights a week (R. 98-99). For this he received $10 or $15 per game (R. 98-99). From the testimony of Wells, a pitcher on the same baseball team (R. 98-99), and others (R. 95-96) he was a good ball player and appeared to be happy while so engaged. Wells considered him one of the smartest catchers he had ever pitched to and roomed with him for two months or longer (R. 98-99).

In June, 1920, he went to work for the Southern Pacific Railroad Company and was employed by that company for a substantial period thereafter until April, 1922. The dates of his employment and the wages paid were as follows (R. 93-94):

| | | Monthly | Annually |
|---|---|---|---|
| Second half of June, 1920 | | $62.30 | |
| First half of July | $ 2.69 | | |
| Second half of July | 34.90 | | |
| | | 37.59 | |
| First half of August | 81.84 | | |
| Second half of August | 14.73 | | |
| | | 96.57 | |
| First half of September | 140.84 | | |
| Second half of September | 149.83 | | |
| | | 290.67 | |
| First half of October | 172.34 | | |
| Second half of October | 139.64 | | |
| | | 311.98 | |
| First half of November | 67.59 | | |
| Second half of November | 181.84 | | |
| | | 249.43 | |
| First half of December | 83.64 | | |
| Second half of December | 130.52 | | |
| | | 214.16 | |
| | | | $1,262.70 |
| First half of January, 1921 | 76.24 | | |
| Second half of January | 25.85 | | |
| | | 102.09 | |
| Second half of May | 24.03 | | |
| | | 24.03 | |
| First half of June | 147.48 | | |
| Second half of June | 121.50 | | |
| | | 268.98 | |

| | Monthly | Annually |
|---|---|---|
| First half of July | 24.78 | |
| Second half of July | 28.07 | |
| | | 52.85 |
| First half of August | 117.20 | |
| Second half of August | 64.16 | |
| | | 181.36 |
| First half of September | 59.56 | |
| Second half of September | 51.99 | |
| | | 111.55 |
| First half of October | 36.00 | |
| | | 36.00 |
| | | 776.86 |
| First half of January, 1922 | 46.80 | |
| Second half of January | 65.52 | |
| | | 112.32 |
| First half of February | 60.84 | |
| Second half of February | 46.80 | |
| | | 107.64 |
| First half of March | 60.84 | |
| Second half of March | 65.52 | |
| | | 126.36 |
| First half of April | 9.30 | |
| | | 9.30 |
| | | $355.62 |

Silva, the timekeeper for the company, testified that the men worked according to seniority and that the records in his possession showed that the insured had been cut off from the working list at certain times

because there was not enough work. If he had been dropped from the rolls because of illness it would have been shown (R. 94).

At first he worked as a machinist's helper in the shop and later as a fireman on the road (R. 99-105). Greenman, a timekeeper (R. 95), and Horner, a civil engineer (R. 97-98), both employed by the Southern Pacific during this same period, testified that they had occasion to observe the insured in the shop and also playing baseball, and that they never noticed anything unusual or out of the ordinary about his physical or mental condition.

In the course of his employment with the railroad company, he was twice examined and was given a first class rating on each occasion. Dr. Cornish first examined him in November, 1920, and stated that he did not find anything unusual in his physical or mental make-up (R. 100). He did not observe a fixed stare or fixed expression on insured's face (R. 101). Dr. Mangan conducted the second examination on January 9, 1922, and at that time did not observe anything abnormal about insured's physical or mental condition. He stated that if there had been any abnormality he believed he would have noted it (R. 103), although he admitted that insured might have been afflicted with a mental disability at the time (R. 104).

In 1922 or 1923 he operated a garage in partnership with Arthur F. Hammer for a period of about six months (R. 18, 19, 21, 32). About two months after entering into this partnership, Hammer noticed that

insured was losing interest in his work and in the business (R. 21). He concluded that the insured was crazy (R. 18) and decided to dissolve the partnership because they were losing money (R. 19). He observed that at times insured would be standing at the gasoline pump staring into space for half an hour at a time (R. 19). In later years, while operating a restaurant, he had occasion to observe the insured on visits to the restaurant, and noticed that he continued to stare and act strangely (R. 20-21). Although the partnership earnings were not revealed, Mrs. Eide testified that while insured was engaged in this undertaking he was paying her $60 monthly (R. 32-33).

In October, 1927, he entered the Veterans' Hospital at Palo Alto, California (R. 28-29). Mrs. Eide stated that at the time he was so nervous he could not hold a book in his hand (R. 29). An examination made at the time of admission on October 30, 1927, resulted in a diagnosis of dementia praecox, catatonic type (Ex. 5-A). An examination made February 20, 1928, for the purpose of determining whether the insured might be furloughed resulted in the same diagnosis (Ex. 5-B), as did an examination made by a board of three on June 11, 1930, and another one made July 19, 1931 (Ex. 5-E).

Dr. R. L. Richards examined the insured May 16, 1929, finding him definitely mentally sick and diagnosed his condition as dementia praecox (R. 41). From the history obtained, the doctor was of the impression that the insured had suffered an acute infectious attack in 1918, which was probably encepha-

litis lethargica (R. 42). In answer to a question containing the definition of total permanent disability as set forth in the contract, he expressed the opinion that insured was totally and permanently disabled at the time of his examination in 1929 (R. 42-43).

Dr. Fred J. Conzelmann stated that he was the insured's ward surgeon at the Stockton State Hospital; that insured was admitted to that hospital on June 4, 1932, and had been there since with the exception of a period extending from September 29, 1932 to January 9, 1933. His diagnosis was dementia praecox, paranoid type (R. 48). In answer to a question containing the definition of total permanent disability he expressed the opinion that insured was totally and permanently disabled at that time and that he did not think there was any probability of a cure (R. 52). He next interpreted the findings contained in the several examination reports that were made at the Veterans Hospital, Palo Alto, California (R. 53-63). In answer to a hypothetical question in which he was asked to consider the evidence in the case, he expressed the opinion that the insured was totally and permanently disabled in the spring of 1919 and prior to the lapse of the policy on July 1, 1919 (R. 63-64). He expressed the opinion that insured was totally and permanently disabled when the disease began, and he thought that it had its inception with the attack of influenza in service (R. 65). The following question was then propounded (R. 66):

> "THE COURT: It is your conclusion that as soon as the symptoms of what you consider de-

> mentia praecox appear that a person is totally and permanently disabled no matter if they actually are engaged in a vocation?
>
> A. Yes."

Dr. Edwin M. Wilder expressed the opinion, based upon all of the testimony in the case, that the insured suffered from dementia praecox, paranoid type (R. 78). He thought the disease had its inception in the fall of 1918 or the spring of 1919, and was then in its incipient stage (R. 79). When asked by the court as to whether he thought the evidence showed dementia praecox prior to discharge, he answered (R. 79-80):

> I am not prepared to say as to that. He had shown the presence, through the sergeant's testimony, of a very severe infection, practically putting him out of business, but I don't think we have any, as I recall it, I don't recall—it was only an affidavit and read and I didn't get it as well as I did from the men testifying directly. Mr. Romaine's testimony as to his character when he came back to the office immediately after his discharge is the point that I definitely recognize a change of personality.

He thought that when Mrs. Martin first saw the insured in February or March of 1919, that he was then suffering from some type of dementia (R. 80). In answer to a question containing the definition of total permanent disability (R. 81), he expressed the opinion that the insured was totally and permanently disabled prior to July 1, 1918 (R. 82). He stated that physical exercise was not dangerous and that it was a necessary part of the treatment of dementia prae-

cox (R. 87). The shocks resulting from contact with the world were damaging and he thought that train work would hasten dementia praecox (R. 88). He considered baseball a good thing, much better than work in a garage (R. 88). On redirect examination he stated that he did not have any doubt but that insured had dementia praecox and was permanently and totally disabled in the spring of 1919 prior to July.

Dr. Elmer L. Crouch, a Government witness, stated that he examined the insured in November, 1927, at the Veterans Hospital at Palo Alto (R. 108). After detailing the history which was furnished him at the time of his examination and reciting the findings which he made (R. 109-117), he stated that they suggested a diagnosis of dementia praecox catatonic type (R. 117). In answer to a hypothetical question in which he was asked to consider the evidence in the case, he expressed the opinion that the insured was able to follow a gainful occupation in March, 1919, and that total permanent disability had its onset in 1922 or 1923 (R. 119).

Dr. Richard T. O'Neill testified that he examined the insured on June 11, 1930 (R. 129), making a diagnosis of dementia praecox (R. 130). He thought the insured was a constitutional psychopathic inferior, a potential praecox all his life, and that the psychosis probably became pronounced in 1922 or 1923 (R. 131). He thought that an occupation would be the best therapeutic that one could have (R. 132). When asked about a statement appearing in the ex-

amination report which he had signed, in which the beginning date of the incompetency was given as 1919 with a question mark thereafter (R. 133-134), he stated that this meant that it was questionable from the information at hand whether the incompetency had its inception in 1919 (R. 134).

Mrs. Eide, on rebuttal, testified that when insured worked for the Southern Pacific Company at Dunsmuir and came home for visits, he was very nervous and had headaches (R. 134). She also recalled that while he worked at the Merchants Garage he received $50 a month for a period of about three months for work as a night watchman or washing cars (R. 134).

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ANALYSIS OF THE EVIDENCE.

The evidence affirmatively established insured's employment for substantial periods after the date of his alleged total and permanent disability on January 29, 1919. From February, 1919, to June, 1920, he held various positions. While the exact periods of his various employments and the wages received were not definitely shown because the evidence was somewhat conflicting and incomplete, it appears from his own statements and the testimony of others that he worked during the major portion of the time elapsing between February, 1919, and June, 1920.

In June, 1920, he commenced work with the Southern Pacific Railroad Company, and continued with some interruptions until April, 1922. The company

records were produced covering the period of employment and they established beyond dispute that for the twenty-two months' period he received wages aggregating $2395.18, or a monthly average of over $100.00, notwithstanding several periods of enforced idleness due to lack of work, amounting in all to some seven months (R. 94). So that, eliminating time lost due to economic factors and computing on the basis of months actually worked, the monthly average would be in excess of $150.00. Using either figure the monthly earnings represented a substantial increase over his prewar monthly wage of $85.00. He also received $10.00 or $15.00 per game for playing Sunday baseball. Employment such as this has been repeatedly held sufficient to refute the claim and to bar recovery on a war risk contract. *Lumbra v. United States,* supra; *United States v. Spaulding,* supra; *Deadrich v. United States,* supra; *United States v. Alvord,* supra; *Grant v. United States,* supra; *United States v. Deal,* 82 F. (2d) 929 (C.C.A. 9th). The principle upon which these cases rests is aply stated in *Alvord v. United States* in the following language:

> To say that a person, who could do, and did do, the amount of work which the plaintiff performed following his discharge from the army, was during that period "totally and permanently disabled", is to say something which is obviously not so, if the words be given their usual meaning. They are powerful words carrying a high content of meaning which perhaps has not always been fully recognized in cases of this character.

Although the authorities also recognize the fact that work performed at a risk to the insured's health or life will not bar a recovery, this case does not fall within that category, for the evidence did not establish that insured's employment with the Southern Pacific was injurious to his health. On the contrary, the evidence pretty definitely established that he possessed the physical and mental capacity to do the work and that he rendered satisfactory services while so engaged. Two examinations by company physicians resulted in his being accorded a first class rating and failed to reveal any physical or mental abnormalities (R. 100-104). Working associates attested his normal conduct while working and playing baseball (R. 95-99). One of these was the pitcher on the same baseball team, the insured being the catcher, and he thought the insured was one of the smartest catchers he ever pitched to. His opportunities to observe were of the best for he also roomed with the insured for two months or more.

In fact there was no showing that the insured suffered from dementia praecox or any disability while working for the Southern Pacific unless the opinion testimony of plaintiff's medical witnesses be accepted as sufficient for that purpose. None of the medical witnesses had examined him in 1920, 1921 or 1922 while he was on the rolls of the company or for many years thereafter. Dr. Richards first examined him May 16, 1929, Dr. Conzelmann first examined him June 4, 1932, seven and ten years respectively after the employment terminated. Dr. Wilder never examined him.

However, both Doctors Conzelmann and Wilder expressed the opinion that he had been totally and permanently disabled and suffering from dementia praecox prior to the lapse of his insurance contract on July 1, 1919, attributing the disease to the influenza attack suffered in service. Their opinions that he was totally and permanently disabled were without weight because they were on the ultimate issue and were not within their province as medical experts. *United States v. Spaulding,* supra, *United States v. Stephens,* 73 F. (2d) 695 (C.C.A. 9) and *Hamilton v. United States,* 73 F. (2d) 357 (C.C.A. 5). Furthermore, they were very plainly contrary to the physical facts and lacked probative force. *United States v. Spaulding,* supra; *Deadrich v. United States,* supra, and *O'Quinn v. United States,* 70 F. (2d) 599 (C.C.A. 5).

Their opinions that he had dementia praecox during service would likewise seem to be without probative value because contradicted by the fact that insured was found physically and mentally sound when examined before discharge and when examined while working for the Southern Pacific Railroad Company. In *United States v. Spaulding,* supra, the Supreme Court said:

> As against the facts directly and conclusively established this opinion evidence furnishes no basis for opposing inferences.

Opinion testimony of a like character was given in *Grant v. United States,* a case which also involved dementia praecox, and in holding that such testimony was insufficient the court said:

> Undoubtedly he has had the ailment attributed to him since January, 1918, but certainly up to 1930 he cannot be said to have been totally disabled thereby. Doctors who never saw him before 1930 thought he had demenita praecox and that he must have been able to follow continuously a substantially gainful occupation, but this opinion must yield on the latter point to the facts. *Hamilton v. United States,* 74 Fed. (2d)—. They say that while worry is harmful in such cases, work is not, but is calculated to be beneficial. What Grant did makes it clear that at no time before the lapse of his policy could he rightfully have said to the United States: "Pay me. I can no longer make a living. A reasonable verdict could not have been had for the plaintiff."

But even though it be assumed that there was sufficient evidence in this case to support an inference that the insured was suffering from dementia praecox on January 29, 1919, this would not suffice for proof of an incipient dementia praecox within the life of the insurance policy, does not spell total permanent disability when the subsequent conduct of the insured demonstrates that the disease was not totally disabling. *Poole v. United States,* 65 F. (2d) 795 (C.C.A. 4), certiorari denied, 291 U. S. 658, *Grant v. United States, supra, United States v. Gwin,* 68 F. (2d) 124 (C. C. A. 6) and *United States v. Cochran,* 63 F. (2d) 61 (C.C.A. 10). There was evidence to show dementia praecox during the life of the insurance contract in all of these cases, but the disease did not prevent the pursuit of an occupation after the contract had lapsed and thus was not considered totally dis-

abling. Grant was discharged from the military service on a Surgeon's Certificate of Disability because of dementia praecox.

Ordinarily work is helpful rather than harmful to a person afflicted with incipient dementia praecox. It was so in *Grant v. United States,* supra and *Poole v. United States, supra.* Its therapeutic value is recognized by the medical profession, occupational therapy being one of the standard forms of treatment prescribed in mental cases. While Dr. Wilder did not think that train work would prove beneficial because of the responsibility involved in performing certain of the tasks incidental thereto, such as timing the throwing of a flying switch, he did think that baseball was a good thing and that physical exercise was a necessary part of the treatment of the praecox. Whether the work performed by the insured while employed by the Southern Pacific Railway Company involved the throwing of switches or not, the fact remains that he did the work assigned him in a satisfactory manner, fully demonstrating his capacity to engage in other kinds of physical labor not involving the slightest element of worry or responsibility. Of course if he could pursue any occupation without injury to health he was not totally permanently disabled. *Gregory v. United States,* 62 F. (2d) 345 (C.C.A. 4th), *United States v. Cornell,* 63 F. (2d) 180 (C.C.A. 8).

The testimony of the lay witnesses that he was changed in conduct and appearance after his return from military service was inadequate because of the

established fact that whatever his mental condition it did not prevent him from working and was therefore not total. Furthermore, it is recognized that mental diseases are as varied in intensity and shades of difference as is human character so that symptoms which the lay witnesses described might well have denoted a temporary partial or permanent partial disability, neither of which was covered by the contract. *United States v. Kiles,* 70 F. (2d) 880 (C.C.A. 8), *United States v. Brown,* 76 F. (2d) 352 (C.C.A. 1).

Another significant fact inconsistent with the claim of total permanent disability in January, 1919, is that insured's condition evidently did not require medical treatment or institutional care until the year 1927, for it was not sought until then. This was more than eight years after insurance protection expired.

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THE OPINION TESTIMONY GIVEN BY PLAINTIFF'S MEDICAL WITNESSES ON THE ULTIMATE ISSUE OF TOTAL PERMANENT DISABILITY WAS IMPROPERLY RECEIVED.

All of plaintiff's medical witnesses were given the definition of total permanent disability embodied in the war risk contract and were permitted to express an opinion as to whether they considered the insured totally and permanently disabled. Dr. Richards expressed the opinion that the insured was totally and permanently disabled on the date of his examination May 16, 1929 (R. 43). Dr. Conzelmann thought he was totally and permanently disabled at

the time of the trial (R. 52) and that the disability had existed in the same degree since the attack of influenza suffered during military service (R. 63, 64, 65). Dr. Wilder likewise expressed the opinion that the insured was totally and permanently disabled prior to July 1, 1919 (R. 81-82, 89). This opinion testimony was improperly received for it is now thoroughly well settled that the ultimate issue of total permanent disability in a war risk insurance suit is not one to be resolved by the opinions of medical experts and that such testimony invades the province of the jury. *United States v. Spaulding, supra, United States v. Stephens, supra, United States v. White,* 77 F. (2d) 757 (C.C.A. 9), *United States v. Harris,* 79 F. (2d) 341 (C.C.A. 9), *United States v. Hibbard,* 83 F. (2d) 785 (C.C.A. 9), *United States v. Frost,* 82 F. (2d) 152 (C.C.A. 9), *United States v. Provost,* 75 F. (2d) 190 (C.C.A. 5) and *Hamilton v. United States, supra.*

Although an objection was not interposed to the introduction of this testimony and it was not assigned as error when the present appeal was perfected, it is now urged as an additional ground for reversal under the authority of *United States v. White,* supra, wherein this court held that the admission in evidence of similar testimony was plain error warranting reversal notwithstanding the failure of Government counsel to interpose an objection, note an exception or to properly present the question on appeal by an assignment of error. It will be observed that the present case was tried before the above quoted cases were decided.

## CONCLUSION.

As there was no substantial evidence to support the judgment and it was error to admit the opinion testimony on the ultimate issue, it is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
September 14, 1936.

Respectfully submitted,

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No. 8178

# United States
# Circuit Court of Appeals
## For the Ninth Circuit

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UNITED STATES OF AMERICA,
*Appellant,*

vs.

ARTHUR J. EIDE, by BERTHA K. EIDE, his Guardian ad litem,
*Appellee.*

---

Appeal from the District Court of the United States for the Northern District of California, Northern Division.

## APPELLEE'S REPLY BRIEF

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No. 8178

# United States Circuit Court of Appeals

## For the Ninth Circuit

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UNITED STATES OF AMERICA,
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*Appellee.*

---

Appeal from the District Court of the United States for the Northern District of California, Northern Division.

## APPELLEE'S REPLY BRIEF

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### THE FACTS.

This is a "fact" case arising out of a suit at law.

We cannot agree that the Government's "Statement of the Case" is entirely accurate as we will hereafter show by actual quotations from the record itself.

This is a suit on a policy of war risk insurance in the amount of Ten Thousand (10,000.00) Dollars, for which premiums were paid by the insured up to and

including midnight of July 1, 1919, a period of five months after his discharge from the army.

The jury, by their verdict, found as a fact that the insane plaintiff, Arthur J. Eide, has been totally and permanently disabled since January 29, 1919, by reason of mental diseases.

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## ASSIGNMENTS OF ERROR.

The Appellant relies upon two Assignments of Error as follows (R. 10):

> "And in connection with its petition for appeal therein and the allowance of the same, assigns the following errors which it avers occurred at the trial of said cause and which were duly excepted to by it and upon which it relies to reverse the judgment herein:
>
> I.
>
> The District Court erred in denying defendant's motion for a non-suit on the ground that no evidence had been brought forth to show the disability on the date alleged in the complaint.
>
> II.
>
> The District Court erred in denying defendant's motion for a directed verdict on the ground that the evidence was insufficient to sustain the allegation of the complaint to the effect that the plaintiff became totally and permanently disabled prior to the date of lapse of his insurance policy."

PERTINENT STATUTES AND REGULATIONS INVOLVED.

Pertinent statutes and regulations bearing on the particular point involved in this appeal are as follows:

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> "That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protections for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon payment of the premiums as hereinafter provided."

This section was restated in substance in subsequent amendments (Sec. 300 World War Veterans Act, 1924; U. S. C., Title 38, Sec. 511).

In Treasury Decision 20, Bureau of War Risk Insurance, dated March 9, 1918, "permanent and total disability" was defined as follows:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> "Total disability shall be deemed to be permanent whenever it is founded upon conditions

> which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *"

In addition Section 19 of the World War Veterans Act as amended (38 U. S. Code, 445), provides that in the event of disagreement between the insured veteran and the government suit may be brought in the district court etc.

Rule X-(1) of the U. S. Circuit Court of Appeals for the Fifth Circuit reads as follows:

> "No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required before the jury retires to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions; provided: The entire charge may be included in the bill of exceptions by order of the trial judge whenever deemed necessary for a better understanding of the errors assigned."

Rule XI of the U. S. Circuit Court of Appeals for the Fifth Circuit reads as follows:

> "XI.—Assignment of Errors
>
> "The plaintiff in error or appellant shall file with the clerk of the Court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be

allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the Court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the Court and errors not assigned according to this rule will be disregarded, *but the Court, at its option, may notice a plain error not assigned.*" (Italics ours.)

Rule 11 of the U. S. Circuit Court of Appeals for the Ninth Circuit reads as follows:

"Rule 11—Assignment of Errors

"The appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No appeal shall be allowed until such assignment of erors shall have been filed. Citation shall issue immediately upon the allowance of the appeal. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given

or in instructions refused. Such assignment of erors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, *but the court, at its option, may notice a plain error not assigned.*" (Italics ours.)

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## QUESTIONS PRESENTED.

(With Citations).

1. SHOULD THIS COURT REVERSE THE JURY'S VERDICT FINDING THAT THE INSANE APPELLEE HAS BEEN PERMANENTLY AND TOTALLY DISABLED SINCE JANUARY 29, 1919, ON ACCOUNT OF MENTAL DISEASES?

*Parsons v. Bedford,* 3 Peters 433, 7 L. Ed. 732;
*Corsicana National Bank v. Johnson,* 251 U. S. 68, 40 S. Ct. Rep. 82, 64 L. Ed. 141;
*Gunning v. Cooley,* 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 721;
*Lumbra v. United States,* 290 U. S. 551, 54 S. Ct. 272, 78 L. Ed. 492;
*La Marche v. United States,* 28 Fed.(2d) 828;
*United States v. Barker,* 36 Fed.(2d) 556;
*Hayden v. United States,* 41 Fed.(2d) 614;
*Mulivrana v. United States,* 41 Fed.(2d) 734;
*United States v. Burke,* 43 Fed.(2d) 653;
*United States v. Meserve,* 44 Fed.(2d) 549;
*United States v. Rasar,* 45 Fed.(2d) 545;
*United States v. Rice,* 47 Fed.(2d) 749;

*United States v. Stamey,* 48 Fed.(2d) 150;
*Louie Poy Hok v. Nagle,* 48 Fed.(2d) 753;
*United States v. Lawson,* 50 Fed.(2d) 646;
*Sorvik v. United States,* 52 Fed.(2d) 406;
*United States v. Lesher,* 59 Fed.(2d) 53;
*United States v. Dudley,* 64 Fed.(2d) 743;
*United States v. Francis,* 64 Fed.(2d) 865;
*United States v. Burleyson,* 64 Fed.(2d) 868;
*United States v. Todd,* 70 Fed.(2d) 540;
*United States v. Suomy,* 70 Fed.(2d) 542;
*United States v. Kane,* 70 Fed.(2d) 396;
*Vance v. United States,* 43 Fed.(2d) 975 (C. C. A. 7);
*Malavski v. United States,* 43 Fed.(2d) 974 (C. C. A. 7);
*Ford v. United States,* 44 Fed.(2d) 754 (C. C. A. 1);
*United States v. Phillips,* 44 Fed.(2d) 689 (C. C. A. 8);
*Barksdale v. United States,* 46 Fed.(2d) 762 (C. C. A. 10);
*United States v. Godfrey,* 47 Fed.(2d) 126 (C. C. A. 1);
*Carter v. United States,* 49 Fed.(2d) 221 (C. C. A. 4);
*Kelley v. United States,* 49 Fed.(2d) 897 (C. C. A. 1);
*United States v. Tyrakowski,* 40 Fed.(2d) 766 (C. C. A. 7);
*United States v. Storey,* 60 Fed.(2d) 484 (C. C. A. 10);
*United States v. Albano,* 63 Fed.(9th) 677 (C. C. A. 9);

*United States v. Sorrow,* 67 Fed.(2d) 372 (C. C. A. 5);
*United States v. Adams,* 70 Fed.(2d) 486 (C. C. A. 10);
*United States v. Anderson,* 70 Fed.(2d) 537;
*United States v. Flippence,* 72 Fed.(2d) 611 (C. C. A. 10);
*United States v. Brown,* 72 Fed.(2d) 608 (C. C. A. 10);
*United States v. Higbee,* 72 Fed.(2d) 773;
*United States v. Harless,* 76 Fed.(2d) 317 (C. C. A. 4);
*Gray v. United States,* 76 Fed.(2d) 233 (C. C. A. 8);
*Vietti v. Hines,* 48 Cal. App. 266, 192 Pac. 80.

2. ALTHOUGH NOT OBJECTED TO IN THE TRIAL COURT NOR EVEN SPECIFIED IN ITS ASSIGNMENTS OF ERROR, AND NOW SET FORTH FOR THE FIRST TIME IN ITS BRIEF ON THIS APPEAL, THE APPELLANT NOW SEEKS TO RAISE THE QUESTION OF WHETHER REVERSIBLE ERROR WAS COMMITTED IN THE INTRODUCTION OF MEDICAL OPINION TESTIMONY ON THE QUESTION OF WHETHER THE APPELLEE WAS TOTALLY AND PERMANENTLY DISABLED. SHOULD THIS COURT DISTURB THE JURY'S VERDICT FOR THIS REASON?

*United States v. Atkinson,* 296 U. S. .....; 56 S. Ct. 391, 80 L. Ed. .....;
*Rules X-(1) and XI C. C. A. Fifth Circuit* (From Montgomery's Manual of Federal Jurisdiction and Procedure, 3d Ed.);
*Rule 11 C. C. A. Ninth Circuit.*

## Argument

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### I.

### THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT OF THE JURY.

#### THE RULE.

Regarding jury trial, almost one hundred years ago Justice Storey of the United States Supreme Court, in *Parsons v. Bedford,* 3 Peters 433, 7 L. Ed. 732, said:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated in and secured in every state constitution in the Union * * *. One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people."

The rule regarding the quantum of evidence necessary to sustain a verdict has been very aptly stated by the late Judge Sawtelle, in our opinion one of the ablest judges ever to have sat on the Circuit Court of Appeals for the Ninth Circuit. In *United States v. Burke,* 40 Fed.(2d) 653 at page 656, Judge Sawtelle said:

"Courts often experience great difficulty in determining whether a given case should be left to the decision of the jury or whether a verdict should be directed by the court. Fortunately however, the rule in this circuit has been definitely settled and almost universally observed. Judge Gilbert, for many years and until recently, the distinguished senior judge of this court, whose gift for expression was unsurpassed has stated the rule as follows:

> " 'Under the settled doctrine as applied by all the federal appellate courts, when the refusal to direct a verdict is brought under review on writ of error, the question thus presented is whether or not there was any evidence to sustain the verdict, and whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.'

"And on a motion for a directed verdict the court may not weight the evidence, and if there is substantial evidence both for the plaintiff and the defendant, it is for the jury to determine what facts are established even if their verdict be against the decided preponderance of the evidence. Travelers' Ins. Co. v. Randolph, 78 F. 754, 24 C. C. A. 305; Mt. Adams & E. P. Inclined Ry. Co. v. Lowery, 74 F. 463, 20 C. C. A. 596; Rochford v. Pennsylvania Co., 174 Fed. 81, 98 C. C. A. 105; United States Fidelity & Guaranty Co. v. Blum, 270 Fed. 946; Smith Booth-Usher Co. v. Detroit Copper Mining Co., 220 Fed. 600, 136 C. C. A. 58. In the case last cited this court said:

> " 'The right to a jury trial is guaranteed by the Constitution, and it is not to be denied, except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto. United States Fidelity & Guaranty Co. v. Blake (C. C. A.) 285 Fed. 449, 452.'
>
> "Again, 'Such an instruction would be proper only where, admitting the truth of the evidence for the plaintiff below, as a matter of law, said plaintiff could not have a verdict.' Marathon Lumber Co. v. Dennis, 296 Fed. 471."

And in *United States v. Dudley,* 64 Fed.(2d) 743, this Court said:

> "The question before us is whether or not this evidence is so substantial as to justify submission of the case to the jury. We do not weigh the evidence; what our verdict would have been as jurymen is immaterial."

And again this Court in *United States v. Lesher,* 59 Fed.(2d) 53, said:

> "Under the seventh amendment to the Constitution, a jury trial is guaranteed in a civil action; and that it is error to direct a verdict for defendant if there is any substantial evidence is stare decisis."

And again, in *Sorvik v. United States,* 52 Fed.(2d) 406, this Court per Sawtelle, C. J., said:

> "The test to be applied in such a case, of course, is not whether the evidence brings conviction in the mind of the trial judge; it is 'whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party'. United States Fidelity & Guaranty Co. v. Blake (C. C. A. 9), 285 Fed. 449, 452, and cases there cited; United States v. Burke, 50 Fed.(2d) 653, decided by this court June 1, 1931 and cases there cited. And in measuring the quantum of evidence necessary to sustain a possible verdict for the plaintiff, we must bear in mind the remedial purposes of the World War Veterans' Act (38 U. S. C. A. 421 et seq.) which the courts have repeatedly held should be liberally construed in favor of the veterans. United States v. Eliasson C. C. A. 9), 20 Fed.(2d) 821, 824; U. S. v. Sligh (C. C. A. 9) 735, 736, certiorari denied, 280 U. S. 559, 50 S. Ct. 18, 74 L. Ed. 614; U. S. v. Phillips (C. C. A. 8), 44 Fed.(2d) 689, 692; Glazow v. U. S. (C. C. A. 2), 50 Fed.(2d) 178."

See also the following decisions of this Court:

*United States v. Barker,* 36 Fed.(2d) 556;
*United States v. Meserve,* 44 Fed.(2d) 549;
*United States v. Rice,* 47 Fed.(2d) 749;
*United States v. Stamey,* 48 Fed.(2d) 150;
*United States v. Lawson,* 50 Fed.(2d) 646;
*Corrigan v. United States,* 82 Fed.(2d) 106;

*Hayden v. United States,* 41 Fed.(2d) 614 (C. C. A. 9);

*Mulivrana v. United States,* 41 Fed.(2d) 734 (C. C. A. 9);

*United States v. Rasar,* 45 Fed.(2d) 545 (C. C. A. 9).

See also:

*Corsicana National Bank v. Johnson,* 251 U. S. 68, 40 S. Ct. Rep. 82, 64 L. Ed. 141;

*Vance v. United States,* 43 Fed.(2d) 975 (C. C. A. 7);

*Malavski v. United States,* 43 Fed.(2d) 974 (C. C. A. 7);

*United States v. Godfrey,* 47 Fed.(2d) 126 (C. C. A. 1);

*Ford v. United States,* 44 Fed.(2d) 754 (C. C. A. 1);

*Carter v. United States,* 49 Fed.(2d) 221 (C. C. A. 4);

*Kelley v. United States,* 49 Fed.(2d) 897 (C. C. A. 1);

*United States v. Tyrakowski,* 50 Fed.(2d) 766 (C. C. A. 7);

*Gunning v. Cooley,* 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 721.

Bearing in mind the rule, we now turn to an examination of the record to see if there is any substantial evidence upon which the verdict can be sustained under this rule.

## THE EVIDENCE.

### APPELLEE EIDE'S CONDITION BEFORE HE WENT TO WAR.

Arthur J. Eide, the plaintiff, who is now an insane patient at the California State Hospital at Stockton, is described by the witness Joseph F. Henretti (R. 14) as follows:

> "We worked together for about four years. Before the war in the years Arthur and I was working for Davis together he was always very studious and energetic in his work there and put in a lot of time and was very ambitious. He did insurance work, underwriting. He was very neat, always neat in his appearance. I worked in the same department with him. He got along very good with his work."

And again the witness William Romaine, the office manager of the insurance brokerage firm where Mr. Eide was employed before the war, and who himself had been with that company for over forty years, testified concerning Mr. Eide (R. 17):

> "He came to work for us in November, 1912, and he left on December 12, 1917, to go to war. Between 1912 and 1917 I saw Mr. Eide every working day practically all the time he was there. I had charge of the whole office. I knew him very well, came in contact with him, keeping records of attendance and absence, and earnings and so forth. During this period I think he had a very happy appearance, was a very efficient clerk, did his work well, and to all appearances was a perfectly normal individual. He was continuously employed from 1912 to 1917."

Mrs. Bertha K. Eide, the appellee's mother and guardian, testified concerning the appearance of her son prior to the war (R. 27) as follows:

> "He was living with me at the time he went to war at No. 1700 McAllister Street, San Francisco, and was working at that time at Davis', the broker's office. He had been working there for four or five years. Before he went away he appeared to be a jolly boy, good natured, seemed he always took everything so good natured, was always jolly and took me out. He appeared very neat. He always had his clothes in good order and his shoes, and was very particular about his presence."

Mrs. Lucia Martin, who worked with Mr. Eide before the war for Davis & Son (R. 34) testified as follows:

> "I first met Arthur J. Eide at J. B. F. Davis & Son in 1914. I knew him very well. I worked very close to Mr. Eide. He helped me with my work and I went out to dinner with him on numerous occasions and the theatre on numerous occasions and out dancing. He was at all times a very cheerful person. He was more than the average in his neatness, immaculate in his appearance, and I could depend on him at all times to help me with my work. He was in the Fire Department and I was in the Fire Department. I would say that he was an intimate friend. Mr. Eide worked steadily, that is, every day there was work to be done."

It is therefore plain from the evidence, that Mr. Eide was a perfectly normal person prior to his entry into the World War.

We next come to the question of what happened to him while he was in the service.

### WHAT HAPPENED TO EIDE IN THE SERVICE.

Frank A. Barrett, a fellow sergeant in the Army with Eide, testified by deposition (R. 22-23) as follows:

> "While I was acquainted with Mr. Eide he got sick with the influenza during the epdemic. As near as I can recollect it was in September or October of 1918. At that time we were stationed at Florence Field, Fort Omaha. We were quartered in tents which were heated by the usual Sibley stoves and the weather was chilly fall weather. Mr. Eide was removed from our company and sent to the hospital. I should say he was away about one month. Mr. Eide and I have slept in the same tent together for several months prior to his sickness and we worked together all of the time. Before he became sick his health was A number one and after he returned he was in bad health and did not have the pep that he had prior to his sickness and he seemed worried and sickly. After he returned he complained continually of severe headaches and pain in the back of his head. It was difficult to get him out of bed as he would rather stay in the barracks and rest and sleep and complain of headaches; acted rather sluggish and drowsy. I noticed that he would lay in bed at every opportunity, whereas before he was always on the go; rather extremely lively sort of fellow. Also he did not perform his work as he had before and it was necessary to perform some of his duties for him. After Mr. Eide returned

from the hospital, the Company was sent to establish a camp of its own about twenty miles north of Florence Field. The weather there was extremely cold and it rained practically all of the time we were there, and this condition of the weather was much harder on Sergeant Eide than on the rest of us, because of his sickness. Eide was able to 'get by' because the rest of us fellows handled the heavy work. At the time I was discharged I noticed that his health had not improved. He was still rather dull and sickly at that time. He still remained in bed as much as possible and complained of headaches and pain in the back of his head."

And on cross-examination Sergeant Barrett (R. 25) testified:

"I was not present when Sergeant Eide was taken sick, nor do I know what symptoms he had. About all I know is that he was taken to the hospital. Afterwards I perceived that he had slowed up considerably since his sickness and that he was lifeless and did not have the 'pep' and spirit that he had prior to his sickness. He refused to go out to entertainments and parties as he had theretofore and gave as his reason the headache complaint. He would go out occasionally, but not nearly as much as before, but he complained continuously of the headaches until my discharge."

EIDE'S CONDITION IMMEDIATELY UPON DISCHARGE AND AFTER.

William Romaine, the office manager for Davis & Son, testified (R. 17-18 concerning Eide's appearance immediately after his discharge from the army, and before his policy lapsed, as follows:

> "As to my recollection, Mr. Eide came back to the office immediately after the war. I think it was 1919 but I couldn't give you the month or date. He appeared changed at that time. He simply came into the office and talked to the different boys and he was very friendly with different ones, most of the firm and myself around the office, and he was offered his old position if he wished to accept it. I offered that to him personally. His reaction was that he was indifferent and a different man entirely. He didn't seem the same happy sort of an individual and he was indifferent about accepting reemployment. In fact he was changed so much that I asked Mr. Henretti who was one of Mr. Eide's associates if he knew what was the matter. I saw him one time after that when he was in the garage business and he was just about the same."

Arthur J. Hammer, now a restaurant proprietor in San Francisco, and who has known Mr. Eide for more than twenty-five years, and who used to play ball with him before he went into the army described his appearance (R. 18) before the war as "physically fine". This witness went into partnership in the garage business with Mr. Eide after the war, and in describing Eide's appearance after the war between

1919 and 1923, particularly in 1923, when he and Mr. Hammer had the garage together (R. 18, 19, 20, 21), testified:

> "We were in partnership I would say about six months. I came to the conclusion Mr. Eide must be crazy, at the time I had the garage. After I found we were losing business and there must be something wrong so I had to get out of the business and go back to the restaurant business. When I had the garage in 1923 I had several occasions to watch him while he was waiting on customers and I noticed unusual things about his conduct. At times he would be standing at the gasoline pump staring into space for maybe half an hour at a time. I would be working on cars at the back of the garage and I would come up and ask him what was the trouble. He would be just looking into space and wouldn't listen to what I said. It seemed to me as though he wouldn't listen to anything. He would complain about his head aching him. I don't know how much money Mr. Eide drew out of the business and I don't know whether he was subsequently employed. After the garage venture I also saw him in 1919. He came in to eat in the place of business and I would just talk casually to him. I noticed he wasn't exactly the same man he was before the war. I think it was in 1919 that I saw him. I saw him frequently after we dissolved the partnership in the garage. He would come into my restaurant at Sixth and Mission Streets, San Francisco. I know one time he came down there with a Morris Contract to have me sign. He wanted to borrow money to build an invention that he had in view

and I passed it off. About every half hour he would come in with that same contract and want me to sign it. He came in about five or six times. Of course I didn't sign it. He wouldn't look you in the face. He would look down and sort of hold the contract in front of me and seem to be in a hurry to go places. I also noticed that he always seemed to think people were talking against him. He always thought there was somebody was not pulling for him. I noticed this attitude a little before I went into the garage business but didn't pay much attention to it. It was after I went in the business with him that time that I found it. When I first saw him in September of 1919 he seemed kind of distant, didn't seem to have the same manner about him. He seemed to have a far away look, seemed to be looking into blank space. This was different from the way he appeared before the war. After the garage business he would come into the restaurant to eat. He would sit up at the counter to have meals and when the girl put it down in front of him he would stand there and look at it, look into space. I would have to go up and ask him what was the matter. He wouldn't evidently hear me. I would have to shake him and then he would kind of wake up and start to eat. His meal would be sitting in front of him sometimes maybe five, ten or fifteen minutes before he would start it after I had gone up and talked to him. Then he would kind of watch. He would eat and then lay down his knife and fork and kind of look into space some more, maybe sometimes three-quarters of an hour, before he would go out and sometimes he would get up and walk

out and come back in again. Before I was in the garage business he used to come in the restaurant and he would seem kind of strange but I didn't pay any attention to it. Before the war he was always pleasant, always jolly, laughing, able to carry on a conversation. After he wasn't very cordial, seemed to be distant."

Mrs. Bertha K. Eide, plaintiff's mother, testified concerning his condition immediately after he came back from the war and even prior to his discharge as follows (R. 27, 28 and 29):

"* * * I saw Arthur when he returned from the war in January 1919. This was in the first part of January and four or five weeks before he was actually discharged. He had to stay in the Presidio on account of flu. The first time that I saw him he had no expression at all. He looked so different and I says: 'Arthur, what's the matter with you?' 'Oh' he says, 'I left some men down on Market Street', he says, 'I have to hurry.' *He stayed home that time about five or ten minutes.* When he came home again he seemed so quiet and said he had headaches. He didn't tell me that the back of his head hurt but he had to go to bed a couple of days at a time and I put water on his head. This was right after he was discharged. Then they got worse all the time and I tried to doctor him up. I thought it was just ordinary headaches, you know, and I put wet towels on his head and tried to do the best I could for him. He had these headaches when he first came back and he had them for three or four years, maybe more than that, really hard

headaches. He lived with me when he was discharged until I put him into Palo Alto in 1927. I noticed a fixed stare on his face when he first came home he wasn't the same and he wanted to be by himself. He didn't want to go to see any friends and he was altogether different. *He appears to me now to be just the same.* I do not think he is crazy, I think he is nervous. I never thought he was crazy and I do not think so now.

Q. You remember when he tried to work for the Southern Pacific up in Dunsmuir?

A. He worked off and on and he came home between times, odd jobs.

Q. How did he appear when you saw him when he came home?

A. Oh, he was nervous just the same, just about the same all the time.

I remember when he had the garage. When he went away to war he was jolly and had a good hope for the future and when he came back he didn't think anything about the future, didn't have any expression on his face. He was nervous. If I said anything to him why he—the tears would come in his eyes. He was depressed. I don't know how many jobs he had from the time he came back from the service until he entered the hospital in 1927. In 1919 he went one week at the garage and he was fired out of that and the next thing he was at another garage for about three months. He was night watchman at the garage. He quit because he had severe headaches during all of the time. He had headaches all the time when he was at *Dunsmuir* but he was a boy

who never complained very much, but he just went to bed and just stayed there like a dead person. When I first took him to Palo Alto he was so nervous he couldn't hold a book in his hand, you know, it just dropped out of his hand while he was reading. When Arthur worked in the garage he appeared just about the same, he was very nervous, headaches, and night sweats.

Q. Did you ever try to treat him for any of these things?

A. Well, I treat him like I did, you know, like we used to home made treatment. He was just the same all the time." (Italics ours.)

And on cross examination this witness testified in part as follows (R. 29, 30):

"I don't see any difference in Arthur's condition now than it was when he got out of the service. He was very nervous. He couldn't work anywhere and I know it because he tried it after I—Oh I don't know what year it was that he was a night watchman in a place on Market Street and after that he got sick in bed for a long time. When he came out of the Army he went to work at Sansome Street, I think it was, in a garage, 55 Sansome Street. The Merchants' Garage. He worked there one week and was fired. Then he didn't do any work for oh, for a whole year, and the next year he got work at Terminal Garage and he was there about three months. That was in 1920. He didn't do anything else in the meantime beside work at the Merchants' Garage and the Terminal Garage."

And again on Cross Examination (R. 33) Mrs. Eide testified as follows:

> "Q. That was in 1923?
>
> A. Yes, 1922 and 1923 I don't know which.
>
> Q. Do you think at that time he was in the same condition that he is in now?
>
> A. Yes, I think he is just the same as when he came out of the Army. I can't believe anything else. He is very nervous and has been since he came out."

In this connection it must be borne in mind that the government's own doctors testified that the man was incompetent and permanently and totally disabled from 1922 or 1923. Dr. Richard T. O'Neil, the government doctor at the Palo Alto Veterans Hospital (R. 131) testified:

> "* * * He was a potential praecox all his life and probably went through his early life and in the army, but I find from his history and the testimony I have heard in the court that his psychosis busted through and became pronounced around in 1922 or 1923.
>
> The Court: When you say it broke through at that time, it became pronounced, you mean at the time it had reached a degree which made him totally and permanently disabled as it is defined in that definition?
>
> A. Yes."

Indeed it is not questioned by the government but is impliedly admitted that Eide from and after 1922 or 1923 was unquestionably incompetent and insane.

Mrs. Lucia Martin who worked with Eide before the war and was intimately acquainted with him through their work in the Davis Company before the war, testified concerning his appearance immediately after he came back from the war and before his insurance lapsed, as follows (R. 34, 35 and 36):

> "I first saw him after the war in the early spring of 1919. I would say in February or March. I spoke to him at that time about fifteen or twenty minutes. *He appeared irrational to me.* I asked him if his position had been offered to him. He said it had. I said: 'Are you going to take it?' He said 'No', he wasn't interested in it, it gave him terrible headaches to work and didn't pay to work for other people anyway, you never got anywhere. When I saw him he was rather unkempt in his appearance. He didn't seem to be interested in my conversation. He just stood there and had a fixed stare on his face. He just stared straight ahead of him. There wasn't any expression on his face no matter what I said. He wouldn't smile or laugh. I tried to bring up things we used to talk about and used to be interested in. He just didn't acknowledge them at all, apparently almost to the point of rudeness. *He appeared to me to be irrational. So much so that I was really shocked and mentioned it to several of the boys in the office afterward.* The next time I saw him was in the garage on Divisadero Street. While he was at Davis' we had often laughed about the time when I would buy a car. He said he would take care of it. I learned through one of the boys in the office he was in this garage on Divisadero Street. I thought if I took it to a person who knew me

they would service it correctly. I was in there in the morning on my way to work with the car. He acted as though he had never seen me before. He just stood there and stared off into the corner, never answered me, never spoke to me. Finally I left and I worried very much all day about that car, it was a new car and my first car. So when I left the office at five o'clock I thought I would go out and pick up my car. When I got to the corner of Sansome and Pine there was a car standing out almost toward the middle of the street looking very much like my car. I went up and saw it was my license number, my car, with the keys in it, and the engine running. It hadn't been cleaned or washed or hadn't been greased, nothing done to it and there wasn't anyone around. Mr. Eide never made any explanation for this." (Italics ours.)

And on cross examination Mrs. Martin (R. 36, 37, 38 and 39) testified:

"I saw Mr. Eide in 1919 and I would say that he was irrational.

Q. What do you mean by irrational?

A. Well, a person you would know very well, were friendly with, who had always been so courteous to you should suddenly come in and try not to speak to you, just stand there and stare into space no matter how hard you tried to get his attention in conversation, refuse to talk to you. He was almost rude in his inattention and indifference. That I called irrational. I did not attribute his conduct to the fact that he wasn't interested in me any more because I was not engaged to him at any time. I didn't go with him to the exclusion of other young men, or he didn't go with me. It

was just a friendship. On the day that I saw him I was in his company for fifteen or twenty minutes. At that time he was offered his old position, they offered the boys who came back from the war their positions back in our office and he was offered his back. I wouldn't have offered him a position. *I formed the opinion then that he was insane.* I took my car to him later as I heard he was in the garage business. I felt sorry for him. I thought if he had pulled himself together, now that he could get in this garage I would help him out. He wasn't friendly there. He wasn't pleasant or courteous. He stood there and stared, a fixed stare on his face. This alone didn't cause me to think he was insane.

Q. The fact he was rude didn't cause you to think he was insane, did it?

A. No.

Q. But he stared.

A. Yes.

Q. What else did he do beside staring?

A. He kept staring first one way and then another way as though someone were after him and he wanted to bolt out of the place.

Q. What else?

A. Well, the manner of answering me, his answers.

Q. Give me the questions and the answers.

A. Well, I said: 'Arthur, are you going to take your position back? No. Why not? Gives me headaches to work. There is no use in working for people anyway, you never get anywhere anyway.'

Q. Now let's take that then. You asked him 'Are you going to go to work? No. What is the

use of working, don't get you anywhere anyway.' That didn't cause you to think he was insane?

A. Yes, it did, and having known him before.

Q. That is what caused you to think he was irrational together with staring?

A. Yes. My definition of irrational is a person who doesn't act in a sane, sensible, rational manner. I said that Mr. Eide was not sane because I have never had anybody come and stand and stare and act as though they wanted to bolt away when I am trying to talk to them, act as though somebody were after them. He acted offish toward me and there was a marked difference in his personal attitude. I also noted that he kind of stared and looked around and so forth. He could not carry on a conversation with me. I tried my level best. He answered me abruptly. He seemed to have lost interest in me and in the work and in everything.

Q. Now, if you would make the acquaintance of a gentleman and you would be friendly and after a matter of two years would go by and you would meet him and he would be abrupt, indifferent, cold, rude, improvident, instead of looking at you and being interested in your talk, would be looking at someone else, would you under those circumstances come to the conclusion that such person would be insane?

A. Well, there are different ways——

Q. Answer yes or no.

A. The way you have described it I would say no.

Q. You would say no.

A. Yes.

Q. You could not come to the conclusion he was insane?

A. No.

Q. Have I described all the things you observed that day?

A. No.

Q. What else was there?

A. It wasn't just a coldness or rudeness or indifference, it was an expressionless stare, a mask-like face, a face without any expression like an insane person.

Q. Let's include that information as we refer to this imaginary man, say he would have a blank appearance on his face, a harried expression and a blank stare, would you then say such person or man is insane?

A. Yes, I would. I would describe Mr. Eide's look as vacant and shifty. I have not seen him during the last three years. The last time I saw him was when he was in that garage on Divisadero Street. That morning when I took my car there I tried very hard to talk to him. His appearance was just the same. He was just as hazy one time as he was at the other time. I certainly would not have employed him in my service in the Fire Insurance."

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THE APPELLANT'S CONTENTION.

The appellant claims that notwithstanding the foregoing testimony, which of course under recognized rules must be given full faith and credit as well as all reasonable inferences and deductions to be drawn therefrom, such evidence in connection with the medical evidence as shown by the record is not sufficient evidence of total permanent disability prior to the lapsation of the policy on July 1, 1919. Counsel for

appellant seek to rest their whole defense on plaintiff's work record while he worked for the Southern Pacific Company part of the time at Dunsmuir and part of the time at the Bay Shore Shops in Visitacion Valley in San Francisco. They set forth Eide's work record on pages 11, 12 and 13 of their brief and pages 93 and 94 of the Record.

In our opening statement of this brief we stated that we could not agree that the government's statement of the case was entirely accurate as we would hereinafter show by actual quotations from the record itself. In making this statement we referred to the statement at the top of page 13 of appellant's brief where they quote from the testimony of the timekeeper for the Southern Pacific Company as follows:

> "If he had been dropped from the rolls because of illness it would have been shown." (R. 94.)

An examination of the Record, page 94, does not bear this out. The Record shows on the other hand that the very opposite was true, and shows that counsel has misquoted the Record and that the Record itself reads (R. bottom of page 94):

> "If he were laid off because of illness it would *not show on the record.*" (Italics ours.)

We do not claim that counsel for the appellant in writing their brief intentionally meant to mislead the Court by misquoting the evidence but we do claim the mistake occurred in a matter of extreme importance in connection with one of the high points

in this case and although it was probably an oversight on counsel's part we do feel that the same should be called to the Court's attention.

This work record with the Southern Pacific Company, which is the only work record of any consequence which Eide followed after the war, shows that for the last six and a half months of 1920 he earned $1,262.70 or an average of $194.26 per month for the six and a half months. That in 1921 he earned $776.86 or an average of $64.78 per month, not working during any part of February, March, April, November or December of that year, and that during the first four months of 1922 he earned $355.62 or an average of $88.90 per month. In this respect we believe it is a matter of such wide common knowledge that the Court could almost take judicial knowledge of the fact that employment was plentiful and men were hard to get for the years from 1920 to 1923.

Concerning plaintiff's condition while working for the Southern Pacific Company, plaintiff's mother, Bertha K. Eide (R. 134) testified:

> "When Arthur was working for the Southern Pacific Company at Dunsmuir, he would come home and I would see him. He was very nervous and he had headaches just the same."

That a work record is not necessarily conclusive or determinative against a claim of permanent total disability has of course been held repeatedly by this and other courts, including the United States Supreme Court, and if the insured worked to the detriment of his health and work aggravated his con-

dition he could still be totally and permanently disabled notwithstanding that he did work for a time. This we will hereinafter show under an appropriate heading.

### WHAT WORK EIDE ATTEMPTED TO DO AGGRAVATED HIS CONDITION AND MADE HIM WORSE.

Dr. R. L. Richards, a witness called on behalf of the plaintiff, testified (R. 41):

> "I examined Arthur J. Eide professionally on May 16, 1929, when his mother brought him to me and I examined him and gave advice as to treatment. From the nervous and mental troubles, his family history, his personal history, present condition, examination, diagnosis and treatment, I found that Eide was definitely mentally sick; by that I mean that he was suffering from neuropsychiatric disease. He was a case of dementia-praecox and treatment was followed up at the hospital."

And again Dr. Richards testified (R. 42):

> "* * * My impression was that the man had had an acute infectious attack in 1918, that it might have been and probably was encephalitis lethargica. It would not preclude the dementia-praecox-like symptoms which he had at the time that I saw him."

And again Dr. Richards testified (R. 46):

> "Q. Now, you would not be able to say, Doctor, whether this condition was brought about by influenza or not, would you?

A. I could only say that it would be brought about by that. I realize that I have not all the information, if that is what you mean.

Q. That condition that you found this patient in isn't a frequent result of influenza at all, is it?

A. It isn't an infrequent result and it is a well known fact that you do have that sort of a condition following the influenza."

Dr. Fred J. Conzelmann, employed by the California State Hospital at Stockton, who served as a Lieutenant in the regular Army Medical Corps for five years following his graduation from Ann Arbor Medical School in 1905, and who has been employed by the Stockton State Hospital since 1916 with the exception of eight months which he spent in the Medical Corps of the Army at Camp Kearny during the World War and who since June 4, 1932, has been and still is the ward surgeon on Mr. Eide's ward at the State Hospital, testified as follows (R. 48):

"I am the ward surgeon of Mr. Eide. He was admitted June 4, 1932, and he has always been on my ward and he was out from September 29, 1932, to January 9, 1933, and since then he has been back for over a year, always on my ward. I see him nearly every day. His present diagnosis is dementia praecox, paranoid type. This is a disease of the adult. Science has not discovered the cause of the disease. Its usual course is very gradual, extending over months or years before it fully develops and there is usually an oddity of conduct, rudeness and explosive episodes, feeling that he is discriminated against or people are

against him, and then they develop ideas that people are actually persecuting them or getting them out of jobs, very likely to change jobs suddenly without any particular cause. We find it has just been their own idea that somebody is having it in for them, and then as they go on and develop various ideas. Very often they have grand ideas that they have great wealth or they can have an invention and they can communicate through the air with chemical substances, don't need a radio or telephone to talk distance and some have ideas they are God or Christ or John the Baptist or Mary, the Virgin Mary. Some of their inventions, usually something impossible about it, and then they have often mind influences and thought feeling or thought reading and the like. Mr. Eide tells us that he hears voices out of the air, they call him very bad names, so bad sometimes he doesn't want to repeat them, and frequently states he can communicate with the Government just by shouting out loudly and he has these explosive episodes and he sometimes suddenly gets up from the chair, runs up to the wall and kicks it and then runs away from the wall and always asks about when he is to be let out, he is not insane, that people are jealous of his inventions.

Q. Doctor, have you seen Plaintiff's Exhibits 2 and 3 here?

A. Yes.

Q. Have you also seen Mr. Eide drawing like that?

A. Yes, he has at various times. He has made certain drawings at the hospital that he says is

an invention. He has not invented anything that we have ever found out."

There was read into evidence from the Government files a record of plaintiff's examination, being Plaintiff's Exhibit No. 5-A (R. 54). In explaining part of this report Dr. Conselmann testified in part as follows (R. 54):

"Q. (reading) 'Impairment of judgment and lack of insight suggest the diagnosis of dementia praecox, catatonic type, however, residuals of enecephalitis must be excluded.' What is encephalitis, Doctor?

A. (explaining) Encephalitis is—Encephalitis means the brain, Latin word or medical word, and means an inflammation of the brain, and in 1918 we had great epidemics of flu and at the same time we also had epidemic of encephalitis where the individual would pass into a stupor and sleep for a long time and we call that encephalitis or sleeping sickness."

There was next read into evidence as part of Plaintiff's Exhibit 5 a report of a Government examination of the plaintiff at the Government's Veterans Hospital at Palo Alto, dated June 11, 1930, which read as follows (R. 56 and 57):

"Q. (reading) The next examination is dated June 11, 1930. 'Diagnosis: Dementia praecox, catatonic type. Treatment recommend: Continued hospitalization. *Is he competent? No. If not approximate date of beginning of incompetence? 1919?' with a question mark after it.* 'Remarks

and recommendations: Patient was presented to staff on June 9, 1930, the diagnosis above mentioned agreed to by all members. It is the opinion of the staff that patient is psychotic and incompetent, permanently and totally disabled.' what does psychotic mean?

A. That refers to a mental disability. Insanity is the legal word and psychosis is the medical term." (Italics ours.)

Concerning the notation in the Government medical report of June 11, 1930 wherein the phrase is used "Is he competent? No. If not, approximate date of beginning of incompetence? 1919?" Dr. Richard T. O'Neil, a Government doctor, and the doctor who examined Eide at that time and made the report, testified on cross examination as follows (R. 133):

"Q. When do you think his incompetency began?

A. Well, I can't put a specific date except I would say from what I heard in the courtroom the last two days what you say in testimony, I would say around 1922 or 1923.

Q. That is your signature, isn't it, Doctor? (Exhibiting document to witness.)

A. Yes.

Q. I will ask you if you didn't—did you type this report up, was it made under your supervision?

A. Under my direction, yes.

Q. This states: 'Is he competent? A. No. If not approximate date of beginning of incompetency? 1919?', with a question mark.

A. Yes.

Q. Now, what do you say?

A. Well, I say that 1919 if we didn't feel that he was incompetent in 1919 we put the question mark there. We were undetermined. It was questionable if the man was competent or incompetent in 1919 on the information we then had at our hands.

Q. In other words you thought he was incompetent in 1919 but you weren't quite sure so you put a question mark?

A. Well, it would fit either way."

The Government medical records of Eide (R. 62) also show that "he also had facial expression suggestive of encephalitis lethargica".

Regarding the beginning of Eide's total incompetency based upon a hypothetical question which was in turn based upon the evidence in the case, Dr. Conzelmann testified as follows (R. 65):

"Q. Do you believe sufficient facts have been testified to for you to trace back this condition as having existed in years past?

A. I believe that.

The Court: Do you believe you are justified in tracing back this condition of permanent and total disability due to the present condition of the plaintiff?

A. In my opinion the disease began after he had this influenza or what is called flu at the time in the Army.

The Court: Yes, but at what point do you believe it had attained such a magnitude as to constitute permanent and total disability, that is merely tracing back the origin?

A. Well, I believe that—As soon as the thing begins then they are totally disabled, but I believe this man as soon as he had recovered from his acute physical illness, his mental condition, however, he was totally incompetent.

The Court: Prior to his discharge?

A. Yes.

The Court: From the service.

A. Yes."

And again this witness testified (R. 66):

"The Court: It is your conclusion that as soon as the symptoms of what you consider dementia praecox appear that a person is totally and permanently disabled no matter if they actually are engaged in a vocation?

A. Yes."

And further concerning the diseases of encephalitis lethargica or sleeping sickness this medical expert again testified (R. 67):

"Mr. Gerlach: Will you tell us about the disease of encephalitis lethargica, what it is and how it acts?

A. Well, this encephalitis lethargica is, of course, a sleepy sickness where the individual becomes drowsy and sleeps. That was in the first cases to be observed they found the condition, but later they found some of them were merely excited or in delirious stage that would have to be confined in a hospital for mental sickness. Of course, when it passed off we sometimes have residual effects, paralysis of one arm or one side of the face or of one leg, or we have peculiar tremors

and the individual stands in one position and holds his arm very stiff and we call it Parkinson's disease or Parkinson's illness, paralysis, and it occurs after encephalitis. The whole brain is involved, the instrument of the mind, the member that controls our emotions and naturally when the nerves are inflamed why it would be responsible for the peculiar attitude."

And on cross-examination this doctor testified (R. 68):

"Q. Assuming it to be a fact that his discharge shows an entry that he had no disability, would that cause you to wish to reconsider the opinion that you gave?

A. No sir.

Q. You would still come to the same conclusion?

A. That is the way that he was discharged. I have discharged many hundreds of them in one day. We didn't make much of a mental examination at Camp Kearney. They went through in a hurry. We discharged them and put down 'They are physcially well.'

Q. Did you examine this man at Camp Kearney?

A. No.

Q. In other words, the examination you made there at the time they were discharged didn't amount to much?

A. Well, just in a general way. We didn't spend a half an hour examining a person for his mental condition or if they had delusions or hallucinations. If he appeared well and if he didn't complain, we thought he was all right.

Q. Well, Doctor, if he was at the time totally and permanently disabled from a disease known as dementia praecox, would not his facial expression, as you have related, have indicated a blank appearance at that time?

A. Well, it may have, yes, but it isn't necessary to have that because they look sometimes entirely normal in the dementia praecox."

Concerning the effect from a medical standpoint of the appellee's behavior immediately after his discharge, Dr. Conzelmann testified on cross-examination as follows (R. 71 and 72):

"Q. And you then as an expert, you considered that the testimony of the lady friend who told about how he appeared and acted to them, and what the mother testified as to how he acted, was sufficient to connect up the patient's condition with dementia praecox?

A. Yes.

Q. With that of 1919?

A. Yes.

Q. And to the extent that you believed he then was wholly disabled?

A. Yes.

Q. (By Mr. Hjelm). Well, I will put it—I didn't know that he would object and I thought would go as far as I could. Now, Doctor, you are not of the present opinion, are you, that the plaintiff here could not do any physical work in 1919, are you?

A. No, he can do physical work now.

Q. Did you know him, did you know that he was a railroad fireman in 1921 and '22.

A. That is what they testified to.

Q. Did you think he was wholly disabled then, at that time?

A. I think so, yes, according to——"

And again (R. 73 and 74) this witness testified as follows:

"My thought is that from the time he left the Army he should have been placed in some place where he wasn't employed. Making the effort and the stress and strain of life, of course, has caused him to break. In my opinion dementia praecox is not congenital, although there may be a predisposition to it that can be brought about by some event. Taking the definition of permanent and total disability as any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, I would say that he was totally disabled in 1919. I believe he was because he could not continuously continue. I feel that he should have been in a hospital at that time. I think this because from the evidence that one of the witnesses said, he was odd and queer and wouldn't talk. I wouldn't hospitalize every man who was odd and queer. Probably every one of us has some odd idea but it depends on the setting and what occurs. The fact that a person works, or does something doesn't mean he is not sick. *It is a fact that the degree with which dementia praecox accelerates or grows is different in various subjects and is also different under various circumstances.* In this case the evidence was in 1919 soon after he came out of service, he acted queer and odd.

Q. Haven't you, Doctor, in your experience as a doctor had many, numerous occasions, experiences where you have seen patients acting just as that young lady said he acted and notwithstanding that your observation of that subject over the years would be that he didn't develop into an active dementia praecox?

A. Well, I wouldn't say it was active but it was so that it didn't interfere with his work. If he continued it was to the detriment of his own personality because he had——

Q. Interposing: You later observed he could work, that he could do some work?

A. Oh, yes, they all can." (Italics ours.)

And on redirect examination this witness testified (R. 74, 75 and 76) as follows:

"A change of personality is this, a person becomes, or he is considered odd or queer or a little different and they are indifferent, apathetic and even, of course, those ideas of constantly trying to make good and a mental disease definitely recognizes itself. Very often they over rate their ability.

Q. I will ask you this, Doctor, are you able to make a diagnosis of dementia praecox in this case from the symptoms that were manifested in 1919 with the masklike expression and the pain and headaches in back of the head, back of the brain, back of the head and drowsiness?

A. I consider that symptoms of dementia praecox. The disease of sleeping sickness or encephalitis lethargica may have such symptoms in support, and an infection like that could be the

exciting cause of dementia praecox. There are a great many people who have dementia praecox that we are coming in contact with every day of our lives, but it is not very often evident that it is discernible and they are being treated. *My point is that dementia praecox is a type of disease that if you work will quicken it and once having made its manifestation it should be treated, and even though they can do things, slightly different lines of work, they should not be allowed to do them. They should be segregated.* I have seen cases in the asylum where people have come in and undergone treatment and got back and gone out of the asylum and met the outside work and then they came in contact and got nervous and came back into the asylum. They get better in the asylum than they do in the outside world, rest and quiet and shelter from the storms of life and treatment is the only way of effecting a cure." (Italics ours.)

And on redirect examination this witness testified (R. 76 and 77):

"Q. Do you believe in this particular case his whole trouble was caused by the war, his war experiences?

A. Well, I wouldn't say war experiences. I think the illness that he had."

Dr. Edwin M. Wilder, a physician of Sacramento, California, who formerly served on the staff of the California State Hospital at Napa, and who since 1905 has been a member of the Lunacy Commission of Sacramento County, examining patients arrested on

insanity warrants prior to their commitment to State Hospitals, testified for plaintiff (R. 80) as follows:

> "* * * Mr. Romaine's testimony as to his character when he came back to the office immediately after his discharge is the point that I definitely recognize a change of personality.
>
> The Court: In other words, you recognize then what appeared to be manifestations of dementia praecox?
>
> A. In the light of the further developments, yes. I would say that at the time Mrs. Martin saw him in the office in February or March of 1919 he was suffering from some type of dementia. Whether it was a result of the early dementia praecox or the result of encephalitis at this date I am not prepared to say. He may have had them both. We have testimony all through of some symptoms of both."

And testifying further, this doctor (R. 82, 83 and 84) stated:

> "My view is not that he could not muscularly do certain things but that the disease was a continuing thing and that if the matter has not been gone into with known types of treament—very much like tuberculosis, a fellow with tuberculosis. He is totally disabled. If he goes out and chops wood, he could chop wood for a while but he is just as much totally disabled in view of the fact he could not do it—. I believe from the time that dementia praecox made its manifestations and no matter how far it has progressed, as soon as you can recognize it as dementia praecox, that a man is totally and permanently disabled from then on.

Dementia praecox isn't revealed by the nature of the disease even in the early stages. There is a certain point where he always breaks down. He always loses his job. He hasn't good reasoning capacity. He works only under directions. You can take a man not far gone in dementia praecox and if he is not violent with an attendant standing alongside, he will hoe weeds but he may hoe the tops off the flowers at the same time.

The Court: That is when it has reached a certain point. Of course, if you establish that he has reached that point where he will do that—but what I am speaking of is this: Isn't there an early stage from the time it makes its manifestations that the man is able to seek and hold employment and to make a livelihood out of it?

A. They don't make a livelihood, Judge.

The Court: You don't believe this man could make a livelihood?

A. No. As soon as it makes its manifestations he is totally disabled. He is just as much dementia praecox as he ever will be later. Just like a typhoid; the first week, he may walk around and do his work. Well, he is just killing himself and he is just as much disabled then as he will be at the time when he drops. I believe that Mr. Eide showed all the symptoms of dementia praecox prior to July 1st, 1919 and it was reasonably certain at that time that he would carry this disease throughout his lifetime. I don't think dementia praecoxes recover. In the earlier stages of dementia praecox there is no question but that, the first few manifestations of the praecox, the quiet, the rest, are the most essential things in bringing the case to a condition of suspension. If you catch

a case and rest it a great deal, you have a reasonable amount of expectancy of getting it to remit at a relative high grade but in these later cases where they are definitely a dementia praecox it is unfortunate that we have occasional periods of irritation or over wear and tear that result in——

The Court: Interposing: Do you mean the progress of the disease?

Witness: The same amount of disturbance earlier will result in nothing more than modifying the degree while if you give it the same amount later you may kick up a certain amount of violence that will require sequestration and all that but at the same time you don't have any effect upon the termination of it. *I think the only hope of treating the disease successfully is to keep him at rest, to keep him from being up against the stress and storms of life.*" (Italics ours.)

In this respect we desire to call the Court's attention to certain statements made in counsel's brief, which we feel are not entirely accurate. On page sixteen (16) of their brief, counsel for appellant, in quoting Dr. Wilder's testimony state:

> "He thought the disease had its inception in the fall of 1918 or the spring of 1919 and was then in its incipient stage."

and quoting R. 79. Reading the record itself I think Dr. Wilder meant to convey a somewhat different meaning. The Record, page 79, reads:

> "Q. If those facts that have been testified to are true, when, in your opinion, did dementia praecox in the case of Arthur J. Eide begin?
>
> A. In the late fall of 1918 or spring of 1919.

Q. When would you say from those facts was the incipient stage?

A. Probably from the time of the severe infection of whatever character it was, also probably in camp until the first testimony that we have as to change in personality."

Another glaring misrepresentation and misquotation of the evidence is further found in the brief of counsel for appellant at the bottom of page 20 under the title "Analysis of the Evidence" where counsel in referring to Dr. Wilder's testimony states:

"Dr. Wilder never examined him."

We are afraid the Record is inclined to disagree with counsel's statement, for the Record on page 86 states:

"I examined this man Thursday, the 22nd day of February, 1934. I know nothing of him prior to that time except the testimony which I have heard here."

Concerning the effect of Eide's working on the railroad, on cross examination Dr. Wilder testified (R. 88):

"Q. So physical exercise, as I understand, Doctor, physical exercise in and of itself is not bad for him; in fact that is something you give them to help them. In other words, being occupied with something that ought to be done on a car or a train, that amount of thinking that would be required to do that, you don't think that that would be a strain, would hurry on the dementia praecox?

A. I do. I think working on a train, a train man and all the incidentals of train work are not conducive to the type or kind of rest, or any of the things that would help his recovery. Then the contacts, the responsibility in determining just when to make a flying switch, let them out, throw over a lever when the thing is within twenty feet or twenty-five feet, that is quite a problem."

And on redirect examination Dr. Wilder testified (R. 88 and 89) as follows:

"Q. In this particular case Mr. Hjelm has picked out various detailed instances of conduct by Mr. Eide and asked you to venture an opinion. What we are interested in is the whole picture, taking the whole picture clear back to the beginning when he was affable, agreeable, sociable, dependable, neat in appearance, and an ambitious young man before the war, he suffered the infection in the fall of 1919, followed by a complete personality change whereas afterward he presented a picture of undependableness, unsociability, mask-like expression, unreliability, bearing in mind all those things in the man, have you any question in your mind at all that he had dementia praecox and was permanently and totally disabled in the spring of 1919, prior to July 1, 1919?

A. I have no doubt. I have said so."

WHY A CLAIM FOR INSURANCE WAS NOT FILED UNTIL 1929.

In explaining why Mrs. Eide waited until 1929 to put in a claim for this insurance she testified (R. 90):

"Q. Now, the other question I want to ask you is this: You put in a claim in this case in 1929. Why didn't you put in that claim before?

A. Well, I didn't know if we had any right to it but someone told me down in Palo Alto that I should put in a claim.

Q. Just as soon as you learned you had a right under the policy, you put in a claim?

A. Yes."

SUPPOSED CONFLICT IN THE EVIDENCE.

It is true that certain government doctors as well as other government witnesses testified somewhat contradictory to the plaintiff's witness, but that is purely a question for the jury, whose verdict, we understand, on conflicting evidence is conclusive here. We cannot fail to remark in passing in this respect that there is a glaring inconsistency of at least one government witness, Henry Bogel who testified for the government by deposition, who when asked to describe the appellee stated that (R. 92):

"* * * At that time he was heavy set, and had blonde hair."

whereas the Record, page 60, states that it was recorded that when Eide was examined at the Palo Alto Veterans Hospital by the Government that he had brown hair, brown eyes and weighed 135.

Also, the Record, page 113, states that when Dr. Elmer L. Crouch, a government doctor at the Veterans Hospital at Palo Alto examined Eide he made the notation:

"Height: sixty-seven and three-quarter inches. Weight, 147 pounds dressed. Skin is rather oily, brunette. No eruptions or cicatrices. Hair: Dark brown, moderately thick, oily."

The Jury may well have concluded that not only the witness Bogel but many of the other Government witnesses were as badly mistaken in their testimony in other respects as they were in regard to Eide's appearance. However as we understand it, it was incumbent upon the appellee Eide to prove his case by a preponderance of the evidence and by the same token it was incumbent upon the appellant to prove its assertions by its witnesses and where there was a conflict in the testimony it was the sole and exclusive province of the jury to weigh the evidence and to determine in their own minds whom they were to believe and whom they were to disbelieve. At any rate such a conflict as we understand it presents no question for the appellate court.

Concerning the effect on mental patients of playing baseball Dr. Edwin J. Cornish, a witness for the government, testified on cross examination (R. 101 and 102) as follows:

> "Q. Mental patients can play baseball, can they not?
>
> A. Yes, if they can.
>
> Q. Yes. Mental patients are capable of playing baseball, are they not, although they are badly affected mentally?
>
> A. I think it would be possible for them, yes.
>
> Q. As a matter of fact at the State hospitals, Napa and also Stockton, you go up there on Sunday afternoon and you will see baseball games in operation where they have mixed teams of patients and attendants and sometimes doctors, isn't that true?

A. It might be, yes, part of the treatment for them."

Concerning the proper treatment for patients suffering with dementia praecox Dr. Elmer L. Crouch, a government doctor, testified (R. 128):

> "I think shutting a patient up in the early stages of dementia praecox is not only good practice—I think what causes the praecox to react is the difficulty of adjustment and the difficulty in finding themselves and something should be done to waken them with a certain thing, a line that they are interested in. That is part of the treatment of praecox. They make adjustment under supervision."

We submit that from the foregoing testimony it is clear that the facts in this case distinguish this case from the cases cited by counsel for appellant in their brief, particularly *United States v. Spaulding,* 293 U. S. 498. At the top of page 20 of their brief counsel for the appellant recognizes the rule that work performed at the risk to the insured's health or life will not bar recovery.

SINCE WHAT WORK THE RESPONDENT DID WAS AT THE RISK OF HIS HEALTH AND LIFE, HIS WORK RECORD DOES NOT BAR HIM FROM RECOVERY UNDER HIS INSURANCE CONTRACT.

In the leading case on what constitutes permanent total disability and the interpretation of the definition (Treasurer's Decision 20 W. R. dated March 9, 1918) the Supreme Court in *Lumbra v. United States,* 290

U. S. 551, 561; 54 S. Ct. 272, 78 L. Ed. 492 (at page 275, 54 S. Ct.) said:

> "The war risk contract unqualifiedly insures against 'total permanent disability.' The occasion, source, or cause of petitioner's illness is therefore immaterial. His injuries, exposure, and illness before the lapse of the policy and his condition in subsequent years have significance, if any, only to the extent that they tend to show whether he was in fact totally and permanently disabled during the life of the policy. March 9, 1918, in pursuance of the authorization contained in the War Risk Insurance Act, the director of the Bureau ruled (T. D. 20 W. R.): 'Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability. Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.'
>
> "The phrase 'total permanent disability' is to be construed reasonably and having regard to the circumstances of each case. As the insurance authorized does not extend to total temporary or partial permanent disability, the tests appropriate for the determination of either need not be ascertained. The various meanings inhering in the phrase make impossible the ascertainment of any fixed rules of formulae uniformly to govern its construction. That which sometimes results in total disability may cause slight inconvenience under other conditions. Some are able to sustain

themselves, without serious loss of productive power, against injury or disease sufficient totally to disable others."

And again, on page 276, the Supreme Court said:

"Total disability does not mean helplessness or complete disability, but it includes more than that which is partial. 'Permanent disability' means that which is continuing as opposed to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent. The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of total permanent disability. He may have worked when really unable and at the risk of endangering his health or life."

And further, on page 276, the Supreme Court said:

"It may be assumed that occasional work for short periods by one generally disabled by impairment of mind or body does not as a matter of law negative total permanent disability."

In *United States v. Flippence,* 72 Fed.(2d) 611 (C. C. A. 10) at page 613, the Court said:

"On the other hand, it is settled by high authority, that if one, unable to work in the sense that he is afflicted with a disease where rest is indicated nevertheless works 'when really unable and at the risk of endangering his health or life' such work does not bar recovery if the proof shows the insured to be otherwise entitled to recover. Lumbra v. United States, 290 U. S. 551, 54 S. Ct. 272, 78 L. Ed. 492. See also, Storey v.

United States (C. C. A. 10), 60 Fed. (2d) 484; United States v. Fitzpatrick (C. C. A. 10), 62 Fed. (2d) 562; United States v. Thomas (C. C. A. 10), 64 Fed. (2d) 245; United States v. Pearson (C. C. A. 10), 65 Fed. (2d) 996; United States v. Brown (C. C. A. 10), 72 Fed. (2d) 608. If, during the life of his policy, an insured is afflicted with a disease which may be cured by a period of rest, but if, instead of following that course, he works until the disease reaches the incurable stage after his policy lapses, he cannot recover; not, however, because barred by his work record, but because at the time his policy lapsed his disease was curable and his disability temporary. *On the other hand, if, as here, the malady is incurable before lapse, and if it is of a nature where complete rest is necessary to prolong life, then work done thereafter endangers his life and does not necessarily bar recovery.*" (Italics ours.)

In *United States v. Brown,* 72 Fed.(2d) 608 (C. C. A. 10), at page 610, the Court said:

"Employment may be of such a nature and duration that it conclusively refutes any idea of total and permanent disability. On the other hand, a person who is incapacitated to work, impelled by necessity and aided by a strong will, may engage in work that aggravates his condition and hastens his death. See Nicolay v. United States (C. C. A. 10), 51 Fed. (2d) 170, 172, 173; United States v. Phillips (C. C. A. 8), 44 Fed. (2d) 689, 691; Lumbra v. United States, 290 U. S. 551, 560; 54 S. Ct. 272, 78 L. Ed. 492.

*"One who has a serious and incurable ailment for which rest is the recognized treatment and*

*which will be aggravated by work of any kind, is nevertheless totally and permanently disabled, although he may for a time engage in gainful employment. One so incapacitated may only work at the risk of injury to his health and danger to his life."* (Italics ours.) See Lumbra v. United States, 290 U. S. 551, 560, 54 S. Ct. 272, 78 L. Ed. 492; Nicolay v. United States (C. C. A. 10), 51 Fed. (2d) 170, 173; United States v. Phillips (C. C. A. 8) 44 Fed. (2d) 689, 691; Carter v. United States (C. C. A. 4), 49 Fed. (2d) 221, 223; United States v. Lawson (C. C. A. 9), 50 Fed. (2d) 646, 651; United States v. Burleyson (C. C. A. 9), 64 Fed. (2d) 868, 872; United States v. Sorrow (C. C. A. 5), 67 Fed. (2d) 372; United States v. Spaulding C. C. A. 5), 68 Fed. (2d) 656.

In *United States v. Sorrow,* supra, the Court said:

> "One is totally disabled when he is not, without injury to his health, able to make his living by work."

In the case of *United States v. William J. Higbee,* 72 Fed.(2d) 773 (C. C. A. 10), the Court laid down the well recognized rule, which we submit is applicable to this case, as follows:

> "He has worked since then but it apparently was done in a commendable effort to earn a living. Total and permanent disability does not require that one be an invalid or confined to his bed. He may work spasmodically with frequent interruptions, caused by his physical condition, and still be totally and permanently disabled. (Nicolay v. United States, 51 Fed. (2d) 170; United States v.

> Rye, 70 Fed. (2d) 150.) And work done under pressure of necessity, when health requires rest, does not necessarily disprove disability. The jury may well have found that insured was totally and permanently disabled; that his condition required rest and inactivity, but that the inescapable necessity to earn a livelihood for himself and his family spurred him to work with injury and aggravation of his physical condition. If so, he is not barred from recovering upon his contract. (Barksdale v. United States, 46 Fed. (2d) 762; United States v. Phillips, 44 Fed. (2d) 689; United States v. Spaulding, 58 Fed. (2d) 656.) Neither the fact that he received vocational training nor his long delay in instituting this action is conclusive against his right to recover. Both are circumstances for consideration of the jury under appropriate instructions of the court. (Lumbra v. United States, 290 U. S. 551; United States v. Nickle, 70 Fed. (2d) 872.)"

We believe that there can be no question in regard to this case but that there was substantial evidence that Eide worked when really unable and at the risk of endangering his health or life. See *Lumbra v. United States,* 290 U. S. 551, 54 S. Ct. 273, 78 L. Ed. 492.

The Supreme Court in deciding the *Lumbra* case, and in its opinion after making the statement quoted above cites several cases. The first case cited by the Supreme Court in the note is that of *United States v. Phillips,* in which the Court said:

> "Some persons, who are totally incapacitated for work, by virtue of strong will power may continue to work until they drop dead from exhaus-

tion, while others with lesser will power will sit still and do nothing. Some who have placed upon them the burdens of caring for aged parents or indigent relatives, feeling deeply their responsibility and actuated by affection for those whom they desire to assist, will keep on working when they are totally unfit to do so. The mere fact that insured did work for Smith-McCord-Townsend Dry Goods Company and also for Montgomery Ward & Company does not necessarily prove that he could follow continuously a gainful occupation. The evidence shows that this work was carried on under great difficulty and was a light class of work." See United States v. Phillips, 44 Fed. (2d) 689 (C. C. A. 8).

The Supreme Court likewise cites, on page 499 of the *Lumbra* case, the case of *United States v. Godfrey.* In the *Godfrey* case, it appeared that the veteran was constantly on a payroll from October 14, 1919, until February 3, 1927, earning thirty to thirty-five dollars a week, and yet the verdict of the jury was accepted and the judgment affirmed, the Circuit Court for the First Circuit, saying:

> "The evidence is persuasive that Godfrey was a war victim. He was entitled to the most favorable view of the evidence. * * * To hold him remediless because he tried, manfully, to earn a living for his family and himself, instead of yielding to justifiable invalidism, would not, in our view, accord with the treatment Congress intended to bestow on our war victims."
>
> *United States v. Godfrey,* 47 Fed.(2d) (C. C. A. 1).

The next case cited in the footnote on page 499 of the *Lumbra* case is that of *Carter v. United States,* wherein Judge Parker stated the principle of law that we believe to be applicable in this case, which is:

> "To say that the man who works, and dies, is as a matter of law precluded from recovery under the policy, but that one who following the advice of his physician refrains from such work, and lives, is entitled to recovery, presents an untenable theory of law and fact, and emphasizes the necessity for a determination upon the facts in each case whether the man * * * was able to continuously pursue a substantially gainful occupation."
>
> *Carter v. United States,* 49 Fed.(2d) 221 (C. C. A. 4).

The next case cited in the footnote to the *Lumbra* case, on page 499, is the case of *United States v. Lawson* decided by this Court (50 Fed.(2d) 646). In the *Lawson* case the veteran went to work on May 15, 1920, at a salary of $1100 per annum, plus a bonus of $240, and worked for this for one year, and then after doing some other work, on April 1, 1921, he was given a probatory appointment as forest ranger at a salary of $1220 per year, plus an annual bonus of $240, serving in this capacity until August 31, 1923. On September 1, 1923, he was appointed as a forest clerk at a basis salary of $1100 per year, in which capacity he served until April 15, 1924. The latter part of September, 1924, he became Postmaster at Spencer, Idaho, his annual pay being $1100, and he held that

job at that salary continuously until the time of the trial in 1930, and this Court per Mr. Circuit Judge Sawtelle, said:

> "It might be argued that the fact that plaintiff managed to hold several positions for the greater part of the time during the years in question, and actually engaged in work, proves that he was able to work and not totally and permanently disabled. But this does not necessarily follow. It is a matter of common knowledge that many men work in the stress of circumstances, when they should not work at all. When they do that they should not be penalized, rather should they be encouraged. A careful examination and consideration of the evidence herein convinces us that the plaintiff worked when he was physically unable to do so, and that, but for the gratuitous assistance of friends and relatives who did much of his heavy work and the assistance of those whom plaintiff employed at his own expense, he would have been unable to retain his several positions. Under such circumstances, he should not be made to suffer for carrying on when others less disabled than he would have surrendered."
>
> *United States v. Lawson,* 50 Fed.(2d) 646 (C. C. A. 9) at 651.

We believe that the case at bar is a much stronger case than the *Lawson* case in favor of the veteran, for the reason that Lawson was still holding his position as postmaster at the time of the trial and at the time the appeal was decided while in the case at bar, Eide has been unable to attempt to do any work at all since 1922 or 1923.

In a case decided by this Court, that of *United States v. Burleyson,* 64 Fed.(2d) 868, it appeared that the veteran had worked continuously since service and was alive at the time of the trial, and this Court sustained the verdict, saying:

> "On this diagnosis the experts disagree, nor is it entirely clear from their testimony that it was detrimental to the veteran's health to work as he did in the event that he was suffering from Buerger's disease. However, the weight of this evidence was for the jury. Their verdict is to the effect that for the veteran to work continuously would impair his health. In view of this situation, no matter how unsatisfactory the condition of the record, we must hold that there was substantial evidence to go to the jury upon the question of the total and permanent disability of the veteran before the lapse of his war risk insurance policy."
>
> *United States v. Burleyson,* 64 Fed.(2d) 868 at 872.

In a case which involved a heart disability it appeared that the veteran had earned $15,000. (*United States v. Francis,* 64 Fed.(2d) 865, 9th C. C. A.) The verdict of the jury in behalf of the veteran was sustained upon the theory that it was for the jury to determine whether the work that he had done had been injurious to his life or health.

In summarizing Francis' work record, this Court per Mr. Circuit Judge Wilbur, said:

> "It is claimed by the veteran that notwithstanding his long periods of work and substan-

tial remuneration therefor, aggregating in all about $15,000., he was 'totally and permanently disabled' during that whole period, within the meaning of that phrase as defined by the Treasury Department regulations and by the decisions of the courts. This view was sustained by the jury under proper instructions from the court and the question is whether or not the court erred in denying the motion of the Government for directed verdict.

The testimony in favor of the veteran on the trial was directed to the proposition that although he did in fact work, and although he did so continuously for long periods of time, he was unable to do so because he thereby imperiled his health and shortened his life by reason of the excessive load put upon his heart, whose functions had been seriously impaired by the wound and resulting pus infection."

*United States v. Francis,* 64 Fed.(2d) 865.

The evidence shows that Eide was continually in pain and working caused his headaches to become worse (R. 36, 37, 38 and 39). Concerning the effects of a man working in constant pain the Circuit Court of Appeals for the 4th Circuit per Mr. Circuit Judge Northcott in *United States v. Harless,* 76 Fed.(2d) 317 at page 319 said:

"A man should be held totally disabled if he cannot work at any substantially gainful occupation without continuous pain and suffering of such a character that it would not be reasonable to expect him to endure it."

And as was aptly stated by a federal district judge, in a war risk insurance case (*McGovern v. United States,* 294 Fed. 108):

> "As permanency of any condition (here, total disability) involves the element of time, the event of its continuance during the passage of time is competent and cogent evidence."

In the following war risk insurance cases the Courts held the evidence sufficient to sustain the verdict:

*Hicks v. United States* (C. C. A. 4), 65 Fed.(2d) 517;

*United States v. Lesher* (C. C. A. 9), 59 Fed.(2d) 53;

*United States v. Meserve* (C. C. A. 9), 44 Fed.(2d) 549;

*La Marche v. United States* (C. C. A. 9), 28 Fed.(3d) 828;

*Mulivrana v. United States* (C. C. A. 9), 41 Fed.(2d) 734;

*United States v. Riley* (C. C. A. 9), 48 Fed.(2d) 203;

*Fladeland v. United States* (C. C. A. 9), 53 Fed.(2d) 17;

*Bartee v. United States* (C. C. A. 6), 60 Fed.(2d) 247;

*United States v. Harless,* 76 Fed.(2d) 317;

*Gray v. United States,* 76 Fed.(2d) 233;

*United States v. Adams,* 70 Fed.(2d) 486;

*United States v. Anderson,* 70 Fed.(2d) 537 (C. C. A. 9);

*United States v. Griswold,* 61 Fed.(2d) 583;
*United States v. Jensen,* 66 Fed.(2d) 19 (C. C. A. 9);
*United States v. Sessin,* 84 Fed.(2d) 667 (C. C. A. 10);
*United States v. Hossmann,* 84 Fed.(2d) 808 C. C. A. 8).

In their brief counsel for the appellant refer to certain supposed inconsistencies in the testimony of certain of plaintiff's witnesses on direct examination and on cross examination.

Speaking of inconsistencies, between the examination in chief and the cross examination of a witness, the California District Court of Appeals in *Vietti v. Hines,* 48 Cal. App. 266, 192 Pac. 80, said:

> "'In passing on the legal effect of plaintiff's evidence, the examinations in chief are not to be detached from the cross-examinations.' (Masten v. Griffing, 33 Cal. 111), and it may be added that in passing upon the testimony of a witness elicited on cross-examination, such testimony is not to be detached from his examination in chief or considered without reference to the latter. In other words, the testimony of the witness must be considered in its entirety to determine the weight to which it is entitled."

And as was said by the late Judge Sawtelle in *Louie Poy Hok v. Nagle,* 48 Fed.(2d) 753 (C. C. A. 9):

> "'Mere discrepancies do not necessarily discredit testimony. * * * Testimony must be understood in the light of the reason upon which they

> rest, * * * otherwise all testimony would be self-impeaching.' Wong Tsick Wye v. Nagle, 33 Fed.(3d) 226, 227 (C. C. A. 9)."

Counsel for the appellant also in their brief refer to certain statements made by the insane appellee in his application to the Southern Pacific when he applied to them for work. Certainly these statements at most were for the consideration of the jury and are certainly not conclusive as to the facts in any respect, it being a jury question pure and simple.

See

*La Marche v. United States,* 28 Fed.(2d) 828, 830 (C. C. A. 9);
*United States v. Albano,* 63 Fed.(2nd) 677, 681.

**ANSWER TO APPELLANT'S BRIEF IN RE INSUFFICIENCY OF THE EVIDENCE.**

Counsel cites among others the *Lumbra* case as authority for their claim that the employment such as the insane appellee held was sufficient to refute his claim and to bar recovery on his war risk policy. Without burdening the Court with quotations from the other cases cited we merely cite that the Supreme Court in the *Lumbra* case after stating what we have heretofore quoted said:

> "But that is not this case. Petitioner, while claiming to be weak and ill and, contrary to the opinion and diagnoses of examining physicians, that he was really unable to work, did in fact do much work. For long periods amounting in the aggregate to more than five years out of the ten

following the lapse of the policy he worked for substantial pay. No witness, lay or expert, testified to matters of fact or expressed opinion tending to support petitioner's claim that he had suffered 'total permanent disability' before his policy lapsed."

We submit there is no similarity whatsoever between the facts in the *Eide* case and the facts in the *Lumbra* case. Counsel in their brief state that plaintiff's medical testimony goes no further than to state that plaintiff was permanently and totally disabled and that such opinion evidence invades the province of the jury and has no force whatsoever.

We shall of course answer this argument in another part of our brief. However, at this time we wish to point out to the Court that disregarding the evidence of the doctors in testifying that plaintiff was permanently and totally disabled, certainly without this part of their testimony there is still ample evidence to show that from a medical standpoint the appellee Eide was permanently and totally disabled. Even the government doctors and the government reports cast a serious question as to whether or not the plaintiff was incompetent from 1919 and before his policy lapsed (R. 56, 57, and 133). Appellee's medical experts testified that basing their opinion upon the physical facts proved in the case, Eide was incompetent and insane and suffering from dementia praecox and probably in addition encephalitis lethargica at the time he came home from the Army and several months before his insurance lapsed.

Certainly it needs no citation of authority to the effect that one who is incompetent and insane is permanently and totally disabled. Counsel, on page 22 of their brief, say that if they were to assume that Eide was suffering from incipient dementia praecox on January 29, 1919 it did not constitute permanent and total disability until later. It must be remembered in this respect that appellee's medical experts placed the incipient stage of his dementia praecox in the fall of 1918 when he had the acute infection which caused his insanity (R. 79) and at the time of his discharge on January 29, 1919 it was not only well advanced and had rendered him insane and incompetent but was then incurable and that the only chance of rendering it stationary or holding it in a period of suspense was to keep him quiet and away from all work. In other words to protect him from the stress and strains of life, and to keep him under strict supervision. Counsel cites the cases of *Grant v. United States,* 74 Fed.(2d) 302, and *United States v. Alvord,* 66 Fed.(2d) 455, and also *Poole v. United States,* 65 Fed.(2d) 795, as authority for the proposition that "ordinarily work is helpful rather than harmful to a person afflicted with incipient dementia praecox" and states that work is prescribed as one of the standard forms of treatment prescribed in mental cases.

We submit that a reading of the *Grant, Alvord* and *Poole* cases hardly goes that far because after all, all those cases purport to do was to review the record in each particular case and decide upon the law as applied to the evidence in that particular case. We con-

tend that whether or not dementia praecox is a curable or an incurable disease is a medical question and not a legal question. Likewise, that as to the prescribed treatment for dementia praecox the question presented is a medical question for medical experts rather than a legal question for lawyers.

In *Poole v. United States,* supra, it appeared that Poole, who claimed to be suffering from dementia praecox, worked four years steadily as a drill press operator for the Southern Railroad Company between October, 1924 through 1929 and during that period earned $5,885.63; that he got better instead of worse and his guardian was discharged in 1927. Certainly that is not this case. We submit that the facts in *Grant v. United States* and *Alvord v. United States* are also strikingly dissimilar.

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## II.

ALTHOUGH NOT OBJECTED TO IN THE TRIAL COURT NOR EVEN SPECIFIED IN ITS ASSIGNMENTS OF ERROR, AND NOW SET FORTH FOR THE FIRST TIME IN ITS BRIEF ON THIS APPEAL, THE APPELLANT NOW SEEKS TO RAISE THE QUESTION OF WHETHER REVERSIBLE ERROR WAS COMMITTED IN THE INTRODUCTION OF MEDICAL OPINION TESTIMONY ON THE QUESTION OF WHETHER THE APPELLEE WAS TOTALLY AND PERMANENTLY DISABLED. SHOULD THIS COURT DISTURB THE JURY'S VERDICT FOR THIS REASON?

We are not unmindful of this Court's decision in the case of *United States v. Stevens,* 73 Fed.(2d) 695, holding that it is error to permit a doctor to state his

opinion on the question of the permanent and total disability of the plaintiff as an invasion of the province of the jury.

We are also familiar with the case of *United States v. White,* 77 Fed.(2d) 757, decided by this Court. What we claim, however, is that the *White* case has been impliedly overruled by the United States Supreme Court in the Government Insurance case of *United States v. Atkinson,* 56 S. Ct. 391, 296 U. S. ....., 80 L. Ed. .....

In the *Atkinson* case it appears that under a policy of converted Government Insurance the government challenged the Court's holding and instruction to the jury that "The permanent loss of hearing of both ears * * * shall be deemed to be total disability", quoting from the policy itself. It was claimed in that case that such instruction of the Court was contrary to the Supreme Court's ruling in *Miller v. United States,* 294 U. S. 435, 55 S. Ct. 440, 79 L. Ed. 977.

In the *Atkinson* case the government based its right to have the point reviewed by the Circuit Court of Appeals for the Fifth Circuit, on its Rule XI which we understand is almost identical with Rule 11 of the Circuit Court of Appeals for the Ninth Circuit. In fact the part of the rule relied upon is exactly the same, the last part of the last sentence in each rule reading:

> "* * * but the court, at its option may notice a plain error not assigned."

It is our understanding that in the argument in the Supreme Court, counsel for the government relied heavily upon the decision of this Court in *United States v. White,* supra. In passing upon this contention the Supreme Court said (56 S. Ct. 391 at page 392):

> "The government, by its assignment of errors here, assails, as it did in the court below, the correctness of this ruling, but examination of the record discloses that no such objection was presented to the trial court. In consequence the government is precluded from raising the question on appeal.
>
> The trial judge instructed the jury that respondent might recover either on the theory that his loss of hearing constituted in fact a permanent disability preventing his pursuit of any substantially gainful occupation, or that his loss of hearing of both ears, if permanent, was a permanent disability as defined by the policy. The jury was thus left free to return a verdict for respondent if it found that he had suffered permanent loss of hearing of both ears, regardless of its effect upon his ability to earn his livelihood. The government failed to question the correctness of these instructions either by exception or request to charge, and its motion for a directed verdict was upon other grounds not now material."

In deciding that the verdict of the jury will not ordinarily be set aside for error not brought to the attention of the trial Court, the Supreme Court said:

> "The verdict of a jury will not ordinarily be set aside for error not brought to the attention of

> the trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. (Citing cases) It is substantially that adopted by Rule 10, subdivision 1, of the rules of the Court of Appeals for the Fifth Circuit, which requires the party excepting to the charge 'to state distinctly the several matters of law' to which he excepts, and directs that 'those matters of law, and those only, shall be inserted in the bill of exceptions.' "

Further commenting on this point, at page 392 the Supreme Court said:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings. See New York Central R. Co. v. Johnson, 279 U. S. 310, 318, 49 S. Ct. 300, 73 L. Ed. 706; Brasfield v. United States, 272 U. S. 449, 450, 47 S. Ct. 135, 71 L. Ed. 345. But no such case is presented here. The judgment must be affirmed for the reason that the error assigned was not made the subject of appropriate exception or request to charge upon the trial."

In connection with the heretofore approved practice in the trial courts in war risk insurance cases of asking a doctor whether in his opinion the plaintiff was or was not permanently and totally disabled, may we

point out that as a legal proposition it was considered proper and approved practice up to about 1932 or 1933 to permit the doctor to state his opinion concerning the total and permanent disability of the veteran, and in fact the error was not so plain as to even suggest itself to counsel for a period of over twelve years to object to the same and in addition was not such a plain error as even suggested itself to any trial judge or even an appellate court during this period although thousands of war risk insurance cases were tried during which the question was almost invariably asked. In view of this situation it is our contention that such a question is not such a plain error not assigned as meets the rigid requirements set forth by the Supreme Court in the *Atkinson* case.

In fact there are any number of decisions of this Court as well as of other circuit courts of appeal in which it was considered proper to ask this question of a doctor and in which this Court was so impressed (prior to the Supreme Court's decision in the *Spaulding* case) as to affirm judgments based largely upon the doctor's testimony that in his opinion the plaintiff was permanently and totally disabled. In this respect see the following cases: *United States v. Francis,* supra, *United States v. Meserve,* supra, *United States v. Albano,* supra, and others.

In view of the foregoing we respectfully submit that the language of the Supreme Court in the *Atkinson* case that

> "*But no such case is presented here.* The judgment must be affirmed for the reason that the

> error assigned was not made the subject of appropriate exception * * * upon the trial." (Italics ours.)

is entirely appropriate in the instant case and the error should therefore be disregarded.

It is respectfully submitted that counsel for the appellant not having seasonably objected in the trial court to the error now complained of, nor preserved the same by appropriate action, their objection now comes too late and that their second point on this appeal is therefore without merit.

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**CONCLUSION.**

In view of the foregoing it is respectfully submitted:

(1) That the evidence when tested by the applicable rules and the decided cases of the Supreme Court, this Court and other Circuit Courts of Appeal is amply sufficient to sustain the jury's verdict finding the insane appellee was permanently and totally disabled as of the date of his discharge from the service on January 29, 1919, and

(2) That in view of the Supreme Court's holding in *United States v. Atkinson,* supra, no reversible error was committed under the circumstances and therefore the judgment of the lower court should be affirmed.

Respectfully submitted,

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